109-297

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

109-297 No. ~~863.~~ 552

WILLIAM C. WALSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, APPELLANT,

vs.

WILLIAM PRESTON.

No. ~~861.~~ 553

WILLIAM PRESTON, APPELLANT,

vs.

WILLIAM C. WALSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED JUNE 26, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 863.

WILLIAM C. WALSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, APPELLANT,

vs.

WILLIAM PRESTON.

No. 864.

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vs.

WILLIAM C. WALSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS.

FILED JUNE 26, 1882.

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1 In Supreme Court of the United States.

William C. Walsh, Commissioner of the General Land Office of the State of Texas, appellant,
vs.
William Preston, appellee.

In the Circuit Court of the United States for the Fifth Circuit and Western District of the State of Texas, at Austin, in equity sitting.

Hon. Don A. Pardee, circuit judge, and Hon. E. B. Turner, district judge.

Be it remembered, that on the 6th day of March, A. D. 1875, that George Hancock, complainant, filed his bill in equity against J. J. Groos, Commissioner of the General Land Office of the State of Texas, endorsed, to wit, "Equity; No. 98, chancery; George Hancock *v.* J. J. Groos, Comm'r. Bill filed March 6, 1875. M. Hopkins, clerk. Process issued same day," as follows, to wit:

2 Circuit Court of the United States for the Western District of Texas. Fifth Circuit. Austin, Texas.

George Hancock, a citizen of the State of Kentucky, complainant,
against
John J. Groos, Commissioner of the General Land Office of the State of Texas, and a citizen of said State, defendant. } Bill in Equity.

To the Judges of the Circuit Court of the United States for the Western District of Texas:

George Hancock, of Jefferson county, and a citizen of the State of Kentucky, brings this his bill against John J. Groos, of the city of Austin, and a citizen of the State of Texas, and thereupon your orator complains and says: That the Republic of Texas, after establishing its independence, adopted substantially the colonial policy, commenced in 1825 by the Government of Mexico to induce the settlement and colonization of its lands in Coahuila and Texas, under various grants of territory to empresarios or contractors, upon condition that they would, at their own expense, introduce and settle families within prescribed limits, set apart from the public domain, and for that purpose a number of acts of Congress were passed to induce immigration and settlement with provisions to compensate colonial contractors for their time, trouble, and expense in introducing colonists by large and tempting offers of grants of land and control and jurisdiction over all proprietary rights for limited periods, passing vested interests immediately to the grantees, coupled with

exclusive rights of possession to themselves and their sub-grantees on certain conditions specified in the acts and contracts.

That under the authority of these acts thirteen colonial contracts were made and entered into by the Republic through the agency of its President with various colonial contractors, which produced the most beneficial results to the country and the people; and amongst others the President of the Republic induced Charles Fenton Mercer, a citizen of Florida, in the United States, to organize
3 a joint stock company, with the promise of a charter or act of incorporation which was to be subsequently granted for the purpose of colonizing a remote and defenceless frontier district on the waters of Red River and the Trinity River, the boundaries whereof are fully given in said contract, which was duly made and entered into and fully executed on the 29th day of January, A. D. 1844, by and between Sam Houston, President, in behalf of the Republic of Texas, party of the first part, and Charles Fenton Mercer of the second part, a copy whereof from the original, which is in the Department of State, is filed herewith and is made a part hereof, marked Exhibit A.

That by the terms of said contract it was agreed that said Mercer should introduce and settle the colony known as "Mercer's Colony," within the term of five years from the date of said contract, as many emigrant families as he and his associates could settle within said limits, upon certain terms and conditions, at the rate of one family for every section of one square mile of vacant or unappropriated land, and with the proviso that the number of families to be settled in each of the five years succeeding the date of said contract should not be less than one hundred in each and every year of said term. And your orator avers that said Mercer did immediately proceed to enter into possession of said lands, and by himself, his agents and colonists took possession, surveyed and occupied the same, in conformity to the provisions of said contract, and did manage, control and have jurisdiction as proprietor thereof over said colonial reservation, and organized a joint stock company to execute and perform said colonial contract, composed of many men of wealth and respectability, called the "Texas Association," of which he gave due notice to the Secretary of State of said Republic, and said Mercer and said associates did subscribe and pay large sums of money, to wit, more than $20,000, and gave their time, labor and services to establish said colony in good faith, and did introduce and settle within the limits prescribed in said contract and in accordance therewith, and within the term of five years from the date of said contract, not less than one hundred families in each and every year of said term, according to the stipulations of said contract; and your orator says and so avers that the said Charles F. Mercer did well and truly perform all the covenants made and entered into by him in
4 said contract which were to be performed by him and his assigns and legal representatives. That the party of the first part in said contract covenanted and agreed that the party of the

second part should be authorized to introduce and settle emigrants within said colonial limits until they were entitled to each alternate section of 640 acres, or half section of 320 acres, within said limits; but your orator says that before the lapse of five years, and after the date of said contract, that said promise was disregarded by the officers of the Republic of Texas, and said colonists and said Mercer were menaced with force and violence, of which due notice was given to the Commissioner of the General Land Office before the expiration of five years from and after the date of said contract, and said Mercer and said association were greatly obstructed, hindered and delayed in introducing and settling colonists and families within said limits, according to the true intent and meaning of said contract.

And your orator further states that the said party of the first part covenanted and agreed on behalf of the Republic to give, grant and convey to the said party of the second part one section of 640 acres of land, or two half sections of 320 acres, for each and every family which they should introduce and settle upon the lands set apart for colonization, as compensation to the said party of the second part, on the terms stipulated in the contract, and to make a full, absolute and perfect title in the usual mode and form to the party of the second part, or their legal representatives, for such sections or parts of a section to which they might become entitled under the provisions of the contract; and with the agreement that the same should be conveyed to them as soon as and whenever they should exhibit to the Commissioner of the General Land Office, or other proper officer, the evidence that there were families thereon residing who had been settled within said limits by the said party of the second part, or their legal representatives, or as might have been stipulated by them with the colonists in the sub-grants authorized by the contract, if for a smaller quantity of land, and with an agreement in such event that the residue of each 640 acres, after satisfying the colonial sub-grants of said Mercer, should be made directly to the party of the second part and their legal representatives, with a full, perfect and absolute title in fee in the usual mode and form; and your orator avers that before and after the expiration of the
5 said term of five years from and after the date of said contract, to wit, on the 29th day of January, 1849, they, the said Mercer and the Texas Association, were ready and willing to exhibit, and offered to exhibit, to the Commissioner of the General Land Office of the Republic proper evidence that a large number of families, to wit, more than 200 families, were settled within the first year of the term, and more than 1500 other families within the stipulated times before the expiration of said term, to wit, before the 29th day of January, A. D. 1849, and did in fact by his official report, now amongst the archives of the State of Texas and under the control of the defendant, John J. Groos, as part of the records of the Land Office, make due returns of the number and names of the colonists and families introduced and settled in said colony, which report,

verified by the signatures and oaths of D. Rowlett, P. J. Pillians and Thomas C. Bean, contains a true and accurate list of the emigrants who were introduced and settled in said colony by Charles F. Mercer and the Texas Association within his grant; and also contains a list subscribed by the heads of families and persons entitled under him by law as settlers, being one hundred and nineteen families (119), with the date of introduction of each family by Mercer, and the names of the required witnesses, attesting and verifying all the facts of settlement, and proving the strict performance by the said Mercer and Texas Association of all the covenants made by them and to be performed on their part within the first year of said term, according to said contract; and said report was received without objection and admitted to record, and still stands of record, as evidence of the lands to which Charles F. Mercer and his legal representatives were and are entitled to receive under said contract, a copy whereof is herewith filed in this cause, marked B.

And your orator states that notwithstanding the introduction and settlement of said 119 families and the faithful performance of said Mercer and his associates of its provisions, and the evidence adduced as aforesaid, that no conveyances have been made; and your petitioner says that the Land Commissioner failed and refused and still fails and refuses to perform the part of said contract which by said acts and said grant he ought to perform, and that the defendant,
6 John J. Groos, fails and refuses to perform said contract and grant and convey to the legal representatives of said Mercer the said lands or any part thereof, by full, absolute, and perfect titles, or by any evidence of title, upon the pretence, as your orator understands and believes, that said contract was unconstitutional and void.

And your orator further states that the Republic of Texas by its President agreed in said contract that the party of the second part should be allowed and should receive as a further compensation for their services and recompense for their labor and expense in introducing and settling said families a premium of ten sections of 640 acres, or twenty sections of 320 acres of land, for each and every hundred families introduced and settled; and whenever due evidence should be adduced that the party of the second part had settled one hundred families as aforesaid, that the said party or their legal representatives might select said premium sections, and a perfect title to said premises should be made as set forth in said contract; and your orator alleges that due evidence was adduced that the party of the second part had settled more than one hundred families, to wit, 119 families, according to said contract, before the day of , A. D. 1845, and it was received without objection as aforesaid and recorded in the Department of State; but nevertheless the said Land Commissioner refused to allow said premium sections, to wit, ten premium sections, or any sections of land, or any land whatever, or to make any title to the same to the said grantee and said association, and still refuses

to do so, though specially requested, as shown by the paper filed herewith marked C.

And your orator says that it was mutually agreed between said parties that there should be a reservation of said colony lands from location or appropriation, and that all lands lying within the limits of said grant which had not been legally located prior to the date of said contract should remain and be held subject to be settled according to its tenor by the said party of the second part thereto for the full term of five years from the date of said contract; and said lands should be set apart from the public domain exclusively, and from all future locations and claims, to be colonized in the manner specified by said contract for the use and benefit of the party of the second part and the Republic as agreed; but your orator says that not regarding said covenants and said reservation the Land Commissioners of Texas, not long after the date of said contract, did not hold said lands for the uses declared by the said contract for the term of five years, and did not hold the same free from all future locations
7 and claims, but proceeded to issue certificates and receive field-notes and surveys of lands within said limits to and from all persons holding general certificates of location and to issue patents therefor; and that the predecessors of said John J. Groos and the said defendant have continued and he still continues to issue patents upon surveys made within said limits in violation of said contract.

And your orator states, and so avers, that it was agreed that a joint stock company should be organized with authority to appoint by the act of a majority of their number in interest, in such mode as a majority in interest, and by such name as they might agree in writing, or in any articles of agreement, to act under a common name, and to invest one or more persons accordingly with full authority to act as a trustee or trustees as set forth in said contract; and your orator says that a joint stock association, styled the Texas Association, was organized as before stated, and duly reported to the Government of Texas under the name of the "*Texas Association*," and by the act of a majority of their number in interest they did assume said name in articles of agreement and association, a copy whereof will be filed herewith, duly executed, adopting said name and investing Charles F. Mercer with full powers to act as trustee and chief agent as therein declared, and to bind said association; and Charles F. Mercer did continue to act as such until the day of , A. D. 1852, when he sold and assigned his interest in the property of said association for value received to your petitioner, who was duly chosen and appointed trustee and chief agent in the place of said Mercer, and with all his powers, and who entered upon said trust and accepted the same, and continued to act as chief agent and trustee of said Texas Association up to the present time. And your orator says that the shareholders are numerous, and, as far as he is informed, beyond the jurisdiction of this court, and that it would be impracticable to make them parties to the proceeding.

And your orator states that within the period of five years from

and after the date of said contract, the said Charles F. Mercer and said association, though greatly obstructed by the agents and officers of the Republic of Texas, did introduce and settle 1,256 families within the limits of said colony, according to the terms of said contract, and did in every particular well and truly perform all the covenants in said contract which he and they were bound to
8 perform according to its tenor and true meaning; whereby he, the said Mercer and said association, became entitled to have and receive a full, complete, and perfect title to 1,256 sections of land, or equivalent half sections, within said colonial limits, and also to be allowed and to receive title to 120 sections of premium lands therein, being in all 1,376 sections of land of 640 acres, or equivalent half or fractional sections, as specified in said contract.

And your orator states that full evidence was adduced and is of record in the archives of government that 1,256 families, claiming and holding under Charles F. Mercer, and introduced and settled according to law, were so introduced therein and settled prior to the 29th day of January, 1849, and within the term of five years after the date of said grant; and that the State of Texas has recognized the constitutionality and validity of said contract by the decisions of its Supreme Court and by the grant of 1,256 patents to the colonists under said Mercer, and granted to the said 1,256 colonists the whole surveys without regard to the rights of Mercer and the Texas Association, upon such record evidence, a copy of which is filed herewith, marked D and made part hereof; but in disregard of their duties and the official trusts imposed upon the land commissioners of Texas, the predecessors in office of the said John J. Groos, the defendant, have, though often requested, refused and failed, and he, though specially requested and notified, the defendant Groos still fails and refuses to grant any patents to your petitioner and said association as compensation for their labor and expense incurred by the said Mercer in colonizing said lands, or to allow any surveys or give any conveyances to perfect the title as stipulated in said contract.

And your orator is advised that the Republic of Texas at the date of said contract was seized in sovereign demesne of all the land within the limits of the grant to Mercer, and, by the statutes inviting colonial contracts, held out to the world a solemn promise that in all colonial contracts an immediate vested estate, being an equitable estate, should pass to and vest in the contractor, subject, however, to be divested by the non-performance of the conditions annexed to the grant, within five years of the date of the contract. So that the government was left with only the legal estate in fee, and a reversion
9 in fee after the lapse of five years, if the conditions annexed to the grant were not fulfilled; and that said statutes and contract together created and declared a trust whereby the State only retained the legal estate, and empowered and commanded the proper officers to convey said legal estate to the contractor and the colonists as soon as evidence was adduced of the introduction and

settlement of the requisite number of families according to the contract; which vested rights, however, could only be lost or forfeited by non-performance of the conditions annexed to the grants, legally ascertained and lawfully declared, and that it was with such an understanding Charles F. Mercer accepted said contract, and in the full confidence and trust that it would be faithfully performed and specifically executed between him and the officers nominated in the contract to execute specifically the statutory powers conferred upon them; and which trusts the said donees of said statutory powers, raised and declared by the Republic as hereinbefore stated, the said officers now refuse to execute and perform to the manifest wrong, injury, and oppression of your orator and the Texas Association.

Your orator states that not long after the execution of said contract many turbulent adventurers and lawless men entered the country, and wrongfully entered upon, held, and occupied the lands in Mercer's Colony, and the contractor and his associates besought the aid of the government for redress, but in vain; and certain legislation was secured by their misrepresentations and lawless influence so as greatly to hinder and obstruct Charles F. Mercer in the exact and successful performance of each and every detail and particular of said contract, but your orator states that he caused the external lines of said colony to be run, and a map thereof to be returned to the government, a copy whereof is filed herewith duly authenticated and made part hereof, marked E, and other surveys to be made at great expense, to wit, at an expenditure of more than $10,000 for such surveys, plats, maps, advertisements, books, and of more than other $10,000 for travelling and other expenses, within the first year of said term, from which said external lines the lands would have been more completely surveyed but for said obstructions by the officers of the government, and more particularly from the Ordinance annexed to the Constitution of 1845, menacing all such colonial contracts, and denouncing them as unconstitutional and fraudulent, which spread general alarm amongst the colonists and led them to abandon and disclaim the privity of estate between them and the contractors, declared and established in the contract aforesaid, and greatly obstructed Mercer in the faithful fulfillment of his contract.

Your orator states that he visited Texas not long after the time when Charles F. Mercer sold and assigned to him his stock in the Texas Association as aforesaid, and that he found the rights of many other colonial contractors under discussion in the Legislature and pending in the courts, with the prospect that the acts and ordinance aforesaid would be held void and inoperative so far as they tended to infringe or impair the colonization contract, or any rights vested under them, as they were subsequently declared by the Supreme Court and held in the Mercer Colony grants. Your orator was advised that the preparation of the suits would be costly, and that the principles of satisfactory adjustment with the contractors of Peters' Colony would be applied *would be applied* to the Mercer Colony by

the State and would govern its action. He was advised by his associates to await the pleasure of the State, and he, confiding in its justice, awaited the action of its officers and urged his claims upon them under the abiding belief that the justice measured out to the Peters Colony would be meted out to the Mercer Colony. Your orator was thus delayed until the year 1858, when the Supreme Court decided the constitutionality of the contract between the Republic and Charles F. Mercer, and that the only legal or equitable title of the colonists was founded on the Mercer contract, and that, soon after, the war between the States offered insuperable obstacles to the assertion of said claim and precluded all remedy to your orator as an alien enemy, and that afterward the State remained for a long time under a provisional government, and in an unsettled condition, until recently, when he has constantly and urgently petitioned to the Legislature for redress, but never received any response to his demands.

11 Your orator states that he is advised that by the first section of the tenth article of the present constitution of Texas, it is declared that all land titles which have heretofore emanated from the Government shall be registered in the Land Office, and that by force of said provision it is the official duty, according to law, of the Commissioner of the General Land Office to register the land titles as aforesaid of Charles F. Mercer and the Texas Association; but your orator alleges that the said commissioners heretofore have failed, and the defendant, John J. Groos, refuses to register the same as a valid title and grant of land.

Your orator further states, and so alleges, that there are still large bodies and tracts of land lying within the limits of Mercer's Colony, to wit, more than one million of acres of land, which have never been located or patented to any person or persons, and all vacant and still subject to the terms of the said contract; and should in equity be subjected and held to execute the same and perform specifically the provisions thereof.

Your orator further states that by the act of the Legislature of Texas of the 12th of August, 1870, all colony certificates may be located, and all valid colonial claims may be located outside of the limits of the respective colonies and upon any part of the public domain, as your orator is advised, according to the laws now in force in reference to locating and patenting the public land; and that there are nearly one hundred millions of vacant and unappropriated land in said State of Texas thereby thrown open to location, survey and patent.

Your orator states that by the constitution and laws of Texas it is the duty of the Commissioner of the General Land Office to superintend, control and direct the official conduct of all subordinate officers of the General Land Office, and to execute and perform all acts and things touching or respecting the public lands of the

12 State of Texas, or rights of individuals in relation thereto as may be required by law, and that by the act of the 6th of

March, A. D. 1863, entitled "An act to authorize the Commissioner of the General Land Office to issue to all persons and corporations such land certificates as they may be entitled to receive under any general and special law of the State," the duty of said Land Commissioner is declared in these words: "The Commissioner of the General Land Office be, and he is hereby, authorized to issue to all persons and corporations such land certificates as they may be entitled to under any general or special law of the State;" and your orator states that the usual mode of issuing patents for land claims is prescribed in section two of an act of the Legislature of Texas entitled "An act requiring the Commissioner of the General Land Office to issue all patents in the name and by the authority of the State of Texas," is in these words: "All patents for lands, emanating from the government, shall be in the name of and by the authority of the State and under the seal of the State and of the General Land Office, and shall be signed by the Governor and countersigned by the Commissioner of the General Land Office." And your orator is advised that it is the duty of the said defendant, John J. Groos, to execute and perform all things in behalf of the State, respecting the lands in Mercer's Colony, and affecting the rights of your orator and the shareholders of the Texas Association.

And your orator is further advised, and claims that by force of said contract and the nature of the grant of said reservation, that the rights of your orator and the said Texas Association under the same can only be preserved by the intervention of a court of equity, and that unless the said defendant, John J. Groos, and his successors in office, be enjoined and restrained from authorizing further locations, and allowing further surveys and issuing patents hereafter for lands within said limits, that your orator believes all his rights under said contract, and all the rights and property of said Texas Association in said lands, will be forever and irrecoverably lost to your orator; and as your orator has no remedy at common law, or in a court of common law against said defendant, and is remediless unless in a court of equity.

13 *To the end, therefore,* that the said defendant may answer the allegations and matters in this bill of complaint contained, and that it may be decreed by this court that a writ of injunction may issue out of and under the seal of this court, directed to the said defendant, John J. Groos, perpetually enjoining and restraining him and his successors in office as Commissioner of the General Land Office of the State of Texas from further interference with or infringement of said land grant or land reservation, the limits whereof are set forth in said contract as in the premises stated, known as Mercer's Colony; and from allowing any location or survey of the lands lying within the same which are not yet patented; and from issuing or permitting to be issued any patent or grant of lands within said reservation except to your orator and the Texas Association; and from doing or suffering to be done any act whereby such lands may be located, surveyed, or patented to any other person

or persons than to your orator, to be held as set forth in said contract and stated in the premises.

And your orator further prays that he and the said Texas Association may have all such other and general relief in the premises as to this court shall seem meet and agreeable to equity and good conscience.

May it please your Honors, the premises considered, to grant unto your orator a writ of injunction issuing out of and under the seal of this court, to be directed to John J. Groos, Commissioner of the General Land Office of the State of Texas, therein and thereby enjoining and restraining him and his successors in office as hereinbefore prayed; and also a writ of subpœna issuing to them from this court and directed to the marshal of the western district of Texas, commanding the said John J. Groos, Commissioner of the General Land Office of Texas, on a day certain, therein to be named, to appear before this Honorable Court, then and there to answer the premises, and to stand to, abide and perform such order and decree therein as shall be agreeable to equity. And your orator will ever pray, etc.

TERRELL & WALKER AND
HANCOCK, WEST & NORTH,
Solicitors for Complainant.

14 The above bill endorsed in words and figures as follows, to wit:

"Equity—No. 98, Chancery; Geo. Hancock v. J. J. Groos, Com'r; Bill; filed Marth 6th, 1875. M. Hopkins, cl'k; process issued same day."

Demurrer of Defendant Groos.

And afterward, to wit, on April 30th, 1875, the defendant, John J. Groos, filed his demurrer, endorsed, to wit:

"No. 98; Geo. Hancock, complainant, vs. J. J. Groos, Commissioner Gen. Land Office, defendant; Demurrer of Defendant; filed April 30, 1875; M. Hopkins, clerk."

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas.

No. 98.	George Hancock, complainant, vs. J. J. Groos, Commissioner of the General Land Office of the State of Texas, defendant.	Demurrer.

The demurrer of J. J. Groos, defendant, to the bill of complaint of George Hancock, complainant:

15 This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint con-

tained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1. That the complainant's said suit is in effect a suit against the State of Texas, and seeks to interfere with and deprive the said State of the right and power of disposing in its own way of its public lands.

2. That the complainant, if entitled to any relief, (which this defendant denies,) can only obtain the same through the action of the political department of the government of the State of Texas, and that the matters set up in the complainant's bill cannot properly be cognizable by this court.

3. That the said complainant hath not, in and by his said bill, made or stated such a case as entitled him in a court of equity to any discovery from or relief against this defendant as to the matters contained in the said bill, or any of such matters.

4. That if the said complainant, or those through whom he pretends to claim, ever had any demand which could be enforced in the courts, (which this defendant denies,) the same is stale, and that by reason of the great lapse of time and the laches of the said complainant in litigating the same he is not now entitled to any relief as to the matters contained in the said bill, or any of such matters.

5. Wherefore and for divers other good causes of demurrer appearing in said bill, the defendant doth demur therefor, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

GEO. CLARKE,
Att'y Gen., for Defendant.
A. J. PEELER,
Ass't Att'y Gen'l, for Defendant.

16 We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

GEO. CLARK,
Att'y Gen., for Defendant.
A. J. PEELER,
Ass't Att'y Gen'l.

Before the subscriber, clerk of the Circuit Court of the United States for the Western District of the State of Texas, at Austin, within the said district, personally came J. J. Groos, defendant in above-entitled cause, who, being duly sworn, says that the annexed and foregoing demurrer is not interposed for delay.

J. J. GROOS,
Commissioner Gen'l Land Office.

Sworn to and subscribed before me this the 30th day of April, 1875.

M. HOPKINS,
Clerk.

Bill of Revivor by Preston, complainant.

And afterward, to wit, September 8th, 1875, the complainant William Preston filed his bill of revivor, endorsed, to wit: "No. 98 Ch'y. U. S. Cir. C't, west. dist. Texas, sitting in equity. Hancock *v.* Groos. Bill for revivor. Filed Sept. 8th, 1875. M. Hopkins, clerk."

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas.

In the Circuit Court of the United States for the 5th circuit, in and for the western district of Texas, at Austin, holding sessions in equity.

To the Honorable the Judges of said Court:

17 Humbly complaining show unto your Honors, your orator, William Preston, a citizen of the State of Kentucky, residing in Lexington, in said State last named, that George Hancock, on or about the sixth day of March, A. D. 1875, exhibited his original bill of complaint for himself and as trustee for the complainants in said bill set forth in this honorable court against J. J. Groos, Commissioner of the General Land Office of the State of Texas, as the defendant thereto, unto which bill your orator refers and adopts the allegations and prayers for relief thereof. That said defendant having been duly served with process for that purpose appeared and put in his demurrer to said bill; and that said demurrer was on or about the 7th day of June, 1875, set down for argument, since which time no further proceedings have been had in and upon said bill. That the said George Hancock lately, and on or about the 27th day of August, 1875, departed this life, having first made and published his last will and testament, wherein he appointed your orator executor of his estate and enjoined upon him to revive said suit. That said will was duly admitted to probate in the County Court of Jefferson county, Kentucky, a court of competent jurisdiction, and letters testamentary issued to your orator out of said court on or about the 21st of October, 1875. And your orator further showeth that the said suit and proceedings have become abated by the death of the said George Hancock, and your orator is, as he is advised, under the terms of said will and of the trust held by said Hancock, entitled to have the said suit and proceedings revived against the said defendant, J. J. Groos, &c., &c., and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of the said George Hancock.

To the end, therefore, that the said defendant may answer
18 the premises, and that the said suit and proceedings as aforesaid may stand revived and be in the same state and condition as the same were in at the time of the death of said George Hancock, or that the defendant may show good cause to the contrary, may it please your Honors to grant to your orator a writ of subpœna to revive, issuing out of and under the seal of this Honorable Court, to be directed to the said J. J. Groos, Commissioner, etc., etc., thereby commanding him at a certain day and under a certain penalty to be therein limited, personally to be and appear before your Honors in this Honorable Court, then and there to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him and be in the same plight and condition as the same were in at the time of the abatement thereof, and further to stand to and to abide such order and decree in the premises as to your Honors shall seem meet. And your orator will ever pray, &c.

TERRELL & WALKER,
HANCOCK, WEST & NORTH,
Solicitors for Complainant.

Bill of Revivor of Complainant Preston.

And afterwards, to wit, January 26th, 1876, the complainant, William Preston, filed his bill of revivor, endorsed, to wit: "No. 98, U. S. Circuit Court West. District, Texas; Sessions in Chancery; Hancock *v.* Groos. Bill of Rrevivor. Filed January 26, 1876. M. Hopkins, clerk. Service accepted and copy waived, with all legal rights reserved. January 22, 1876. Geo. Clark, counsel for Groos."

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas.

In the Circuit Court of the United States for the 5th Circuit
19 in and for the Western District of Texas, at Austin, holding sessions in equity.

To the Honorable the Judges of said court:

Humbly complaining show unto your honors, your orator, William Preston, a citizen of the State of Kentucky, residing in Lexington, in said State last named, that George Hancock, on or about the 6th day of March, A. D. 1875, exhibited his original bill of complaint on behalf of himself and as trustee for the other parties seeking relief in said bill set forth in this honorable court against J. J. Groos, Commissioner of the General Land Office of the State of Texas, as the defendant thereto; unto which bill your orator refers and adopts the allegations and prayer for relief thereof. That said defendant having been duly served with process for that purpose appeared and

put in his demurrer to said bill; and that said demurrer was, on or about the 7th day of June, 1875, set down for argument, since which time no further proceedings have been had in and upon said bill; that the said George Hancock lately, and on or about the 27th day of August, 1875, departed this life, having first made and published his last will and testament, wherein he appointed your orator executor of his estate, and enjoined upon him to revive said suit. That said will was duly admitted to probate in the County Court of Jefferson county, Kentucky, a court of competent jurisdiction, and letters testamentary issued to your orator out of said court on or about the 21st day of October, 1875; and your orator further showeth that the said suit and proceedings have become abated by the death of the said George Hancock, and your orator is, as he is advised, under the terms of said will and of the trust held by said Hancock, entitled to have the said suit and proceedings revived against the said defendant, J. J. Groos, &c., &c., and to have the said cause put in the same plight and condition as the same was previously to the abatement thereof by the death of the said George Hancock. To the end, therefore, that the said defendant may answer the premises, and that the said suit and proceedings as aforesaid may stand revived and be in the same state and condition as the same were in at the time of the death of the said George Hancock, or that the defendant may show good cause to the contrary, may it please your Honors to grant unto your orator a writ of subpœna to revive, issuing out of and under the seal of this honorable court, to be directed to the said J. J. Groos, commissioner, &c., thereby commanding him at a certain day and under a certain penalty to be therein limited, personally to be and appear before your honors, in this honorable court, then and there to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof; and further, to stand to and abide such order and decree in the premises as to your honors may seem meet. And your orators will ever pray, etc., etc.

TERRELL & WALKER,
AND HANCOCK, WEST & NORTH,
Sol's for Complainant.

Bill of Revivor and Supplement by Preston, Complainant.

And afterwards, to wit, on April 12th, 1879, the complainant, William Preston, filed his bill of revivor and supplement, endorsed, to wit: "U. S. Circuit Court, Western District of Texas, Austin. Hancock *v.* Groos, Land Commissioner, &c. No. 98, Equity. Bill of revivor and supplement. Filed April 12th, 1879. M. Hopkins, clerk."

In the Circuit Court of the U. S. for the 5th Circuit and District of Western Texas, at Austin.

No. 98. Hancock *v.* Groos, Land Commissioner, &c. } In Equity.

The Bill of Revivor and Supplement of William Preston.

To the Honorable the Judges of the Circuit Court of the
21 United States for the Circuit and District aforesaid:

Humbly complaining unto your Honors, sheweth your orator, William Preston, of Lexington, in the State of Kentucky, a citizen of the State of Kentucky, in whose name as complainant this suit has been heretofore revived, that since the date of the revivor of the same the defendant, J. J. Groos, named in the original bill and in said bill of revivor herein, has departed this life and has ceased to be the Commissioner of the General Land Office of the State of Texas, and W. C. Walsh has succeeded the said Groos in said office, and is now the Commissioner of the General Land Office of the State of Texas, and is duly invested with and by law charged with all the rights and duties pertaining to said office in all respects as was his predecessor, the said Groos, the late Commissioner. The said W. C. Walsh is a citizen of the State of Texas and of the circuit and district aforesaid.

Your orator states further, that after the death of said Groos, and after the accession of the said W. C. Walsh and his induction into the said office of Commissioner of the General Land Office of the State of Texas aforesaid, he, your orator, did, in writing, notify the said W. C. Walsh, Commissioner as aforesaid, of the rights of the Texas Association, and of your orator as its chief agent and trustee, and did notify and request said W. C. Walsh, Commissioner as aforesaid, not to issue or deliver or cause to be issued or delivered any land certificate or certificates or patent or patents for lands within the boundaries of Mercer's Colony, as defined in the contract in the original bill herein set forth.

But the said W. C. Walsh, Commissioner as aforesaid, did refuse to obey the said notice and request, and still so refuses, and asserts and threatens that he will, in defiance of your orator's rights and of the rights of the Texas Association, continue to issue such certificates and patents to persons not claiming under or in privity with the contract of Charles Fenton Mercer. And your orator further, at the same time and in the same writing, demanded of the said W. C. Walsh, Commissioner as aforesaid, that the said Walsh, Commissioner, should issue and deliver to your orator as chief agent of the Texas Association land certificates for thirteen hundred and seventy-six sections of land, or an equivalent quantity in sections and half sections, according to the terms of Mercer's contract afore-
22 said.

Yet the said W. C. Walsh, Commissioner as aforesaid, did refuse and still refuses to issue or deliver to your orator any land certificates whatever, and no certificates whatever for any quantity of land whatever has at any time been issued or delivered to your orator, or to his predecessor Hancock, or to Charles Fenton Mercer, or to the Texas Association, or to any one for either; and the said demand of your orator has by the said W. C. Walsh, Commissioner as aforesaid, been refused and disregarded, and is still by him refused and disregarded. A true copy of said written request and demand and notice is herewith now filed, marked P, and the same is made a part hereof.

Your orator further says that he now refers to the original bill of complaint herein and to the bill of revivor herein, heretofore filed, and to all and every the exhibits with each of the same filed, and he repeats each and all the allegations in them and each of them contained, as fully as though the same were here again at large fully written; and he says and charges that all the acts and doings of the defendant Groos therein complained of have been repeated by the said W. C. Walsh, Commissioner as aforesaid, and that the said W. C. Walsh, Commissioner as aforesaid, is now from time to time issuing and delivering, and professes his intent and determination to continue to issue and deliver, to persons not in privity with your orator or the Texas Association, certificates for land and patents for land within the boundaries of Mercer's Colony, in defiance of your orator's rights and of the rights of the Texas Association. All of which is, as your orator charges, against right, and has produced and is now producing irreparable injury to your orator and the Texas Association.

And your orator further unto your Honors sheweth, that by the terms of the association between Charles Fenton Mercer and his associates, it was among and between them provided that said Charles F. Mercer should be and remain the chief agent of said Texas Association; the same was set forth and provided in the original agreement between C. F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association, created and formed in conformity with the provisions of the contract with the Republic of Texas of 29th January, 1844, aforesaid; and due notice of the same was given by said Charles Fenton Mercer, chief agent of the Texas Association, to the Hon. Anson Jones, the then Secretary of State of the Republic of Texas, by written report from Bonham, Fannin county, Texas, dated July 7th, 1844, which was duly received by said Secretary of State of said Republic and deposited and recorded in the archives of said Republic, and is now of record in the office of the Secretary of State of the State of Texas at Austin, in said State, as will fully appear from a copy thereof duly certified, which is now filed herewith and is made part hereof, and is marked "Q."

23

Your orator further states that under the terms of the agreement aforesaid, between Charles F. Mercer and the stockholders of the

Texas Association, the said Mercer's interest in the said colonial grant was divided into one hundred shares, whereof fifty-five were retained by the said original grantee, Mercer, and forty-five were issued to associates to obtain the requisite means for paying the expenses of survey and the introduction and settlement of colonists and the perfect execution and fulfillment of said Mercer's colonial contract with the Republic of Texas, and it was therein agreed that said Charles Fenton Mercer was and remained chief agent of said association; and it was further agreed that his powers as such chief agent were and should be plenary, and that he should provide one or more suitable persons to act as chief agent or agents of the said association in the event of the death, sickness, or inability from any cause, or disinclination further to act of him, the said Mercer, and that such successor so appointed by him should have every power and authority vested in or recognized in said C. F. Mercer by said agreement, including the power to appoint successor or successors, as chief agent or agents, with like powers of control and appointment, and all other powers in said agreement mentioned.

And by the terms of agreement certain certificates of shares were by said Charles F. Mercer issued to each shareholder entitled to the same, signed by him as original contractor with the Republic of Texas and chief agent of the Texas Association, as shown in the printed form of such certificate which is herewith filed and made a part hereof, marked "R."

24 The said agreement between the said Charles F. Mercer and his associates was in the form of an agreement signed by him and each shareholder. The several shareholders signed each such an agreement, and each was identical in form, and each was in the precise form and identical in its provisions with that shown in the printed form herewith filed and made part hereof, marked "S." And the said agreement is the fundamental agreement of association, and is the same under which said Mercer and his associates proceeded to take possession of, survey, and colonize said district known as Mercer's Colony, and under which the colonists introduced by Mercer took possession and derived their titles to lands settled upon by them, and said agreement has never been abrogated, but is still in full force.

Your orator further shows that in the year 1852 said Mercer sold and assigned his interest in said grant, contract, and association to George Hancock, who was duly appointed chief agent of said Texas Association and was continuously recognized by said association as its chief agent and trustee to the date of his death, which occurred on the day of August, 1875. The said Hancock made and published his last will and testament, which was duly admitted to probate and recorded in the proper office in the county and State of his residence, to wit, in Jefferson county, Kentucky. In and by the 8th clause of said will, in execution of the powers conferred on him as the chief agent of the Texas Association, the said Hancock did by virtue of said contract of 29th of January, 1844, and said agreement

of association, nominate and appoint your orator in his stead to act as chief agent and trustee of said Texas Association, and to maintain and prosecute its claim or any suit or action based thereon, and to revive the same and to do all things which he, the said Hancock, could do under said agreement of association and contract, and did also bequeath and devise unto your orator all the right, title, and interest of him, the said Hancock, in and to all his estate, stock, and property in said Texas Association, upon the trust therein set forth. A copy of the said will, duly certified, is herewith filed and is made a part hereof, marked "T."

And your orator says that he did immediately enter upon the office and duty of chief agent and trustee of and for said
25 Texas Association, and has ever since so acted and he is now said chief agent and trustee, and has been and now is recognized as such by said Texas Association and by the members thereof.

And your orator says that by the bequest and devise to him as aforesaid he has an interest large and controlling in amount in the rights and property of the Texas Association.

Your orator states that the Texas Association has never been incorporated, and that no act or charter of incorporation has at any time been granted to Charles Fenton Mercer and his associates, or any or either of them, by any authority.

And your orator further states that Charles Fenton Mercer, having heretofore been an original associate and contractor in the Peters Colony grant, made by the Republic of Texas, did enter into the contract of 29th January, 1844, as shown therein, and in the political controversies of the times objections were (falsely) alleged against said grant and other grants entered into by President Houston, on the ground that they were unconstitutional and void; and not long after, namely, in the year 1845, just before the annexation of Texas, many attempts were made, in the convention assembled to form the constitution of the Republic, so as to create a State constitution in conformity with the contemplated union and the Constitution of the United States, to declare the colonial grants and contracts null and void *ab initio*, for fraud, unconstitutionality, and non-performance of conditions, and others to suspend the discussion of the questions—all of which were rejected by the convention because such a declaration would cause the rejection of the proposed annexation by the United States, so that no clause was adopted in said constitution. And in said constitution prepared by said convention it was provided and determined that the Legislature should provide by law for the institution of legal proceedings against all colony contractors who had entered into contracts with the President of the Republic of Texas, including said Mercer, and allowing, in the ordinance to said
26 constitution attached, in all suits, so provided for by legislative enactment and brought by or against such contractors, or any persons claiming under, by, or through them, the setting forth of any pleas that it would have been competent for the State of Texas to plead, and the introduction of any testimony as well for

frauds or illegality or unconstitutionality as on account of any failure to comply with the conditions of the original grant or contract. And the said constitution, by said convention framed, did require that the Legislature should provide by law a method for determining what lands might have been forfeited, as shown in said constitution and in the ordinance attached thereto.

Your orator says that it was the true intent and meaning of said convention and of the constitution by it prepared not to forfeit any lands or contracts, or the grant or contract of Mercer, but to ordain that the Legislature should by law provide a proper method for a judicial determination of the rights of parties, and what lands, if any, had been forfeited. But your orator avers and charges that the Legislature of Texas has not regarded said mandate of the constitution of Texas, and has hitherto neglected and refused and still neglects and refuses to pass any law providing a method for determin'g what lands, if any, have been forfeited by Charles Fenton Mercer and his associates and successors, or to allow him or them to prove or show their title, or to show that their right in or to any said lands have or have not been forfeited for fraud or illegality or unconstitutionality, or on account of any failure to comply with the conditions of said original grant or contract.

Your orator states and charges that the said Charles Fenton Mercer and the said Hancock and the Texas Association have, since the adoption of said constitution and the admission of Texas into the Union, made repeated application and memorials to the Legislature of said State of Texas to pass such law or laws as would effectuate the said constitutional provision and admit them to the courts to assert and vindicate their rights. And said applications and memorials were received and discussed and referred to committees; but the said Legislature, in each and every instance, after lulling and deluding the said memorialists and applicants into a hope and belief that a law would be passed as directed by the constitution, did fail and refuse, and still fails and refuses, to pass any such law
27 or to afford opportunity to said memorialists or to your orator to establish their claims by judicial modes.

And your orator says and charges that all the other colonial contracts and grants made by President Houston in the name of and for the Republic of Texas, similar to that made with Mercer, have been adjusted and settled finally and fully, either by agreement of the contractors with the State of Texas or by judicial determination under special legislation for the special case enacted, and the contract and grant of Mercer is the only unsettled and unadjusted one.

And your orator further says that in the articles of annexation of Texas under the joint resolution of the Congress of the United States it was expressly provided that the State of Texas should retain all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the Republic of Texas; and your orator charges that the convention which framed

the constitution of 1845 of the State of Texas and said constitution did recognize and admit that the contract of Mercer was at that time one of the liabilities of the Republic of Texas, and required by force of said constitution and ordinance that the same should be determined by due process of law under proceedings therefor to be provided for by the Legislature of Texas.

And your orator further says that Charles Fenton Mercer and his associates and the said Hancock and your orator have never, nor has either of them ever, abandoned, removed, or failed to assert their rights and claims under the said contract, but have, and each has, continually claimed the same, and notoriously and publicly and in all ways to them open or accessible asserted the validity of the said contract and its performance by Mercer and his associates, and the rights of Mercer and his associates under and by virtue of it; and the said right and claim and its continuous and unintermitted assertion and prosecution in all available ways has been ever and now is a matter of the greatest public notoriety in the State of Texas.

Your orator says further that the Republic of Texas by legislative act of 3d February, 1845, did, without right and in wrongful
28 derogation of the contract rights of Charles Fenton Mercer and his associates, require the said Mercer and his associates to have the lines of their colony lands actually surveyed and marked by the 1st day of April, 1845; and the said Mercer, notwithstanding the great difficulty and expense attending so peremptory a demand and the unconscionably short time prescribed, did cause said lines of said colony lands to be actually surveyed and marked before the 1st day of April, 1845.

To the end, therefore, that the said suit and proceedings which became so abated by the death of the said J. J. Groos, Commissioner of the General Land Office of the State of Texas, may stand and be revived against the said W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and be in the same plight, state, and condition as the same were in at the time of the abatement thereof, and that your orator may have the benefit thereof, or that the said defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, may show cause why said suit and proceedings should not be so revived, and that it may be revived accordingly:

May it please your Honors to grant unto your orator the most gracious writ of subpœna to revive and answer, issuing out of and under the seal of this honorable court, to be directed to the said W. C. Walsh, Commissioner of the General Land Office of the State of Texas, thereby commanding him at a certain day and under a certain pain, to be therein limited, personally to appear before your honors in this honorable court, and then and there to answer the premises, and to show cause, if he can, why the said suit and proceedings therein had should not stand and be revived against him, and be in the same plight and condition as the same were at the time of

the abatement thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And your orator will ever pray, etc.

W. PRESTON, *Compl't.*

HANCOCK, WEST & NORTH,
Sols. for Compl't.

29 *Affidavit for Injunction Pendente Lite.*

And afterwards, to wit, on the 16th day of April, 1879, the complainant filed his affidavit for injunction *pendente lite*, endorsed, to wit: "Ch. No. 98. Affidavit of Brown and West. Filed April 16, 1879. M. Hopkins, C'k."

In the Circuit Court of U. S. for 5th Circuit and Dist. of Western Texas, at Austin.

Hancock
98 *v.* } In Equity.
Groos.

The affiant, John Mason Brown, states that on the 10th day of April, 1879, he, in company with C. S. West, one of complainant's solicitors herein, waited upon the defendant W. C. Walsh, at his office in the city of Austin, at or about the hour of noon, and said C. S. West then and there, in the presence of affiant, presented to said Walsh a true copy of the notice and demand of W. Preston, filed with the bill of revivor and supplement herein, and marked Exhibit A. The said copy affiant personally knows to be a true and accurate copy.

And said West then and there explained the same to said Walsh, and desired a reply, which said Walsh promised to give. And afterwards, on the 12th day of April, 1879, this affiant did, in company with said C. S. West, again wait upon said Walsh at his said office, and the said Walsh then and there refused to accede to, or obey, or be governed by the notice and demand aforesaid, but announced his intent and resolve to disregard it, and to proceed, disregarding the asserted rights of complainants.

JOHN MASON BROWN.

Subscribed and sworn to by John Mason Brown this 15 April, 1879, before me.

M. HOPKINS, *Clerk.*

30 In the Circuit Court of U. S. for the 5th Circuit and District of Western Texas, at Austin.

Hancock
98 *v.* } In Equity.
Groos.

The affiant, C. S. West, says that he is one of the solicitors for complainant herein; that on the 10th day of April, at about the

hour of noon, he, in company with John Mason Brown, did wait upon the defendant W. C. Walsh, at his office in the city of Austin, Texas, and did present to said Walsh a true copy of the notice and demand of W. Preston, the original of which is filed as Exhibit P, with the bill of revivor and supplement herein.

And affiant then, in conversation, did explain the purpose and object of the same. And afterwards he, in company with said Brown, did again wait upon said Walsh to receive his reply, and was then by him told that he, the said Walsh, did refuse to accede to, obey, or be controlled by said notice and demand.

Affiant says he knows that unless an injunction is granted to complainant as moved for and prayed, the injury to complainant's rights will be great and irreparable, and such as will leave him without any adequate remedy.

C. S. WEST.

Subscribed and sworn to by C. S. West this 15th day April, 1879, before me.

M. HOPKINS, *Clerk.*

31 *Motion for Injunction Pendente Lite.*

And afterwards, to wit, on the 12th day of April, 1879, the complainant, W. Preston, filed his motion for injunction *pendente lite*, endorsed, to wit: "98, Chancery; Geo. Hancock vs. J. J. Groos. Motion for preliminary writ of injunction; filed April 12, 1879. M. Hopkins, clerk."

In the Circuit Court of the U. S. for the Fifth Circuit and Western District of Texas, at Austin.

98 Hancock v. Groos, Land Comm'r, etc. } In Equity.

An now this day comes the complainant, by his solicitors herein, Hancock, West & North, and moves the court that a preliminary injunction be granted in said cause in accordance with the prayer of said bill of complaint, and that said injunction be continued in force until final decree in this cause, and then be made perpetual.

And in support of said motion the complainant refers to the original bill and the several bills of revivor and supplement herein filed, and the various exhibits on file and to be filed, and the proofs and affidavits which will be exhibited on the hearing of this motion.

HANCOCK, WEST & NORTH,
Sols. for Compl't.

The defendant, W. C. Walsh, will take notice that the foregoing motion has been filed and entered upon the records of the court, and

by order set for hearing on Tuesday next, the 15 April, 1879, at 10 o'clock a. m.

HANCOCK, WEST & NORTH,
April 12th, 1879. *Sols. for Compl't.*

32 *Demurrer of Defendant W. C. Walsh.*

And afterwards, to wit, April 16th, 1879, the defendant, W. C. Walsh, filed his demurrer, endorsed, to wit: "98—Chan.; Hancock v. Groos, Com'r. Demurrer filed Ap'l 16, 1879. M. Hopkins, clerk."

In the Circuit Court of the United States for the 5 Judicial Circuit and Western District of Texas.

George Hancock
v.
J. J. Groos, Com'r.

And now comes W. C. Walsh, Commissioner of the General Land Office of the State of Texas, against whom this suit has been heretofore revived, and with the leave of the court adopts and reaffirms the matters contained in the demurrer to bill of complainant hereinbefore filed by J. J. Groos, his predecessor in office, and of which he prays the judgment of the court.

And further excepting and demurring to complainant's bill, he says that the same shows no cause of action against him, for this: that he is an executive officer, elected, bonded and sworn to obey the laws of the State of Texas; that his duties are prescribed by law, and that complainant does not in his said bill show that he, your defendant, has violated or refused to obey the law under which he holds the office of commissioner aforesaid.

And for further cause of demurrer and special exception to complainant's bill defendant says he ought not to be required to answer the allegations therein contained, because the same have not been sworn to or verified by affidavit or proof of the facts therein contained as required in such cases.

33 And further, that the temporary writ of injunction should not be issued because said bill of complaint filed herein shows upon its face that this defendant cannot issue the certificates prayed for, nor refrain from patenting the lands without violating an official duty.

And further, because the said bill shows upon its face that no injury can accrue to complainant pending this suit.

And further excepting and demurring to complainant's bill and prayer for injunction, this defendant says that he is an executive officer of a sovereign State, and that this court nor no other in the world can legally command or restrain him, and that said bill shows this to be the case.

And further excepting and demurring to complainant's bill, defendant says that the bill as exhibited against him shows upon its face

that he cannot act in the matter complained of without the exercise of an official discretion. Wherefore he says an injunction from this court will not lie against him.

And further excepting and demurring to the complainant's bill, defendant says that said bill shows upon its face that the issuance of the certificates or the refusal on the part of this defendant to patent lands within the borders of what was formerly known as Mercer's Colony involves the exercise of a discretion and is not merely a ministerial act.

Wherefore defendant prays the judgment of the court, and that said injunction be refused.

G. W. McCORMICK,
Att'y-Gen'l, of Counsel for Defendant.

Order of Injunction Pendente Lite.

And afterwards, to wit, on the 21st day of April, 1879, this
34 cause coming on to be heard on the several demurrers of defendant, and on complainant's motion for injunction *pendente lite*, the following order and decree was rendered and filed, endorsed, to wit: "U. S. Circuit Court, Western District of Texas; Hancock *v.* Groos, Com'r, etc. No. 98, in equity. Order of Injunction. Filed April 21, 1879. M. Hopkins, clerk."

In the Circuit Court of the United States for the 5th Circuit and District of Western Texas, at Austin.

No. 98. George Hancock *v.* J. J. Groos, Commissioner of the General Land Office of the State of Texas. } In Equity.

And now, on this 19th day of April, A. D. 1879, this cause came on to be heard upon the several demurrers of the defendants herein to the bill of complaint, and the same having heretofore been argued by the counsel for complainant and defendant, and the court being now fully advised in the premises, it is now here by the court ordered, adjudged, and decreed that the several demurrers of the defendant herein to the bill of complaint be, and they are, severally overruled.

And on the same day, to wit, the 19th day of April, A. D. 1879, this cause coming on further to be heard upon the motion of complainant by his solicitors for an injunction *pendente lite* against the defendant, as prayed for in the bill of complaint and bill of revivor and supplement herein; and reasonable notice having been served upon the defendant, W. C. Walsh, of the time and place when and where the said motion would be made, and the solicitors of complainant and defendant having appeared at the said time and
35 place, and having argued said motion in the hearing of the court, and the court having seen and considered the bill of

complaint and the bill of revivor, and the bill of revivor and supplement herein, and also the several exhibits therewith filed and referred to in support of said motion, and also the affidavits filed in support of said motion, and the court being fully advised in the premises, it is now here further ordered, adjudged, and decreed as follows, to wit:

That a writ of injunction do issue out of this court and under the seal thereof, directed to W. C. Walsh, Commissioner of the General Land Office of the State of Texas, his clerks, draftsmen, subordinates, agents, servants and employees, and all his successors in office, and all their clerks, draftsmen, subordinates, agents, servants and employees, and all officers or agents subordinate to him, or to any of his successors in office, or under the direction, supervision or control of him, or of any his successor or successors in office, enjoining him and them and each and every of them from issuing or delivering, or causing to be issued or delivered, or permitting to be issued or delivered to any person or persons, or corporation, any plat or plats, with a view of making locations in said colony limits, certificate or certificates, patent or patents for any land or lands within the boundaries of Mercer's Colony, as set forth in the bill of complaint and the exhibits therewith filed and therein defined, and from any further interference with or infringement of the land grant or land reservation known as Mercer's Colony, and from doing or causing to be done any act or thing whereby there may issue any patent, certificate, plat or grant of any lands within the boundaries of said Mercer's Colony as defined and set forth in the said bill of complaint and exhibits therewith filed, and as set forth in the copy of the contract made on the 29th January, 1844, by and between the Republic of Texas by Sam Houston, President thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of State of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas, except to the complainant, William Preston,
86 until the final hearing of this cause, and time is given the defendant until the June rules to answer the bill herein.

April 21, 1879. W. B. WOODS, *Judge*.

Disclaimer of W. C. Walsh, defendant.

And afterward, to wit, May 31, 1881, the defendant, Walsh, filed his disclaimer, endorsed, to wit: "No. 98. Circuit Court U. S., 5th Circuit and Western District of Texas. George Hancock *v.* J. J. Groos, Comm'r. Disclaimer of William C. Walsh, defendant. Filed May 31, 1879."

In the Circuit Court of the United States for the Fifth Circuit and Western District of the State of Texas.

George Hancock, complainant,
No. 98. *v.* } In Equity.
J. J. Groos, Comm'r, &c., defendant.

The disclaimer of William C. Walsh, the defendant in the above named suit, to the bill of complaint of the plaintiff.

I, William C. Walsh, have not and do not claim, and never had or claimed to have any right or interest in any of the matters in question in this suit, and I disclaim all right, title or interest, legal and equitable, in any of the said matters; and I say that if I had been applied to by the plaintiff before the filing of said bill of complaint, of his supplemental bill of complaint and bill of revivor, I should have disclaimed all such right, title and interest; and I submit that the said original bill of complaint and the said supplemental bill and bill of revivor ought to be dismissed as against me, with costs.

W. C. WALSH.

GEORGE McCORMICK, *Attorney General,*
AND WILLSON & GAINES,
Counsel for Defendant.

37 *Plea of W. C. Walsh, defendant.*

And afterwards, to wit, on the 31st day of May, 1879, the defendant Walsh filed his plea of *res adjudicata*, endorsed, to wit: "No. 98. Circuit Court of U. S., 5th circuit and western dist. of Texas. George Hancock *v.* J. J. Groos, comm'r, &c. Equity. Plea of W. C. Walsh, the defendant. Filed May 31, 1879. M. Hopkins, clerk."

In the Circuit Court of the United States for the fifth circuit and western district of the State of Texas.

George Hancock, complaina't,
No. 98. *v.* } Plea—Chancery.
William C. Walsh, defendant.

The plea of William C. Walsh, defendant, to the original bill of complaint of George Hancock, plaintiff, and to the supplemental bill of complaint and bill of revivor of William Preston, plaintiff.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said original bill of complaint and supplemental bill of complaint and bill of revivor, set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said original bill of complaint and to the whole of said supplemental bill and

bill of complaint, saith that on, to wit, the 27th day of August, A. D. 1845, the people of Texas, by their delegates in convention assembled at the city of Austin, adopted an ordinance which, among other things, required of and made it the duty of the Attorney-General of Texas, or the district attorney of any district in which any portion of the colonies might be situated, as soon as the organization of the State should be completed, to institute legal proceedings against all the colony contractors who had heretofore entered into
38 contracts with the President of Texas; and if, upon such investigation, it should be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same had not been complied with according to its terms, such contract should be adjudged and decreed null and void; which said ordinance was submitted to a vote of the qualified voters of Texas, and legally adopted by them, to wit, on the day of , A. D. 1845. Defendant alleges that in obedience to this ordinance, on, to wit, the 11th day of October, A. D. 1846, after the organization of the said State under the constitution of 1845, the Attorney-General of said State, J. W. Harris, filed in the District Court of Navarro county, said State, a suit in the name of A. C. Horton, Governor of said State, for and in behalf of said State, as plaintiff, against Charles Fenton Mercer and his associates as defendants, the said county of Navarro being situated within the limits of the said pretended Mercer Colony; that it was alleged in the petition in said suit, among other things, that the said Mercer and his associates, and his and their representatives, failed to introduce and settle one hundred families on lands in said contract designated (and agreed to be set apart) according to the tenor thereof, prior to the 1st day of March, 1845, and also failed to introduce and settle on the lands in said contract described, (and agreed to be set apart,) two hundred and fifty families on or before the expiration of two years from the date of said contract, according to the tenor thereof, and also that said contract was illegal and made in violation of the constitution of the Republic of Texas, and was, therefore, null and void from the beginning. The said petition, among other things, prays that the said contract might be decreed to be invalid, and null and void from the beginning; that in an amended petition filed in said suit by said J. W. Harris, Attorney-General, it was further alleged, among other things, that the said Mercer and his associates did not survey, designate, and mark the boundary of the territory thus set apart for them for purposes of colonization by the terms of the contract aforesaid, as by law and the spirit of said contract they were bound to do; that the terms of said contract
39 fixes the southern boundary of said territory so set apart as aforesaid at a point on the River Trinity, opposite to Cedar Creek, crossing said River Trinity at the lower bank of Cedar Creek, running thence to the mouth of Aquilla, on the River Brazos; that said Mercer and associates have run a line from the Trinity River to the Brazos, but not in accordance with the calls of the contract; that said lines does not extend from the lower band of Cedar Creek,

on the River Trinity, to the Aquilla, on the River Brazos, as by terms of said contract they were bound to do, but run their southern line, commencing at a small spring branch on the River Trinity, never known as Cedar Creek, some eight miles below the Cedar Creek specified in their contract as the call on the Trinity River from which a line should extend to the mouth of the Aquilla on the Brazos River, including thereby a region of country in a triangular shape containing some three thousand square miles more than by the terms of said contract they were entitled to. Also, that the said Charles Fenton Mercer and his associates had violated all and singular the contracts and covenants contained in the said contract of colonization.

Defendant alleges that the said Charles Fenton Mercer and his associates, the defendants in said suit, were duly and legally cited to appear and answer the petition in said suit in accordance with the laws of Texas, and that thereafter, to wit, on the 25th day of September, 1848, the said suit of A. C. Horton, Governor, *v.* Charles Fenton Mercer and his associates, was heard in the District Court of Navarro county, aforesaid, and upon a full hearing thereof by and before said court, it was fully and firmly adjudged and decreed by said court, among other things, upon the verdict of a jury therein duly rendered, that the contract of colonization made and entered into between Sam Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the 29th day of January, 1844, be and the same is hereby decreed null and void.

Defendant further alleges that the aforesaid judgment and
40 decree of said court still remains in full force and effect, in no wise reversed, satisfied or made void, all of which will more fully appear by the record and proceedings in the aforesaid suit in Navarro county.

Defendant alleges that the said colonization contract described in the original bill of complaint in this cause and filed herein as exhibit "A," and upon which the said plaintiff's said complaint is based, is the identical same contract set forth and described in the said suit in the District Court of Navarro county wherein A. C. Horton, Governor of Texas, was the plaintiff, and Charles Fenton Mercer and his associates were the defendants, and is the same identical contract which by the judgment and decree of the District Court of Navarro county, rendered and entered in said suit as aforesaid, was adjudged and decreed to be null and void.

Defendant alleges that under and by virtue of the constitution and laws of the State of Texas, the said District Court of Navarro county was a court of competent and ample jurisdiction to hear and determine the aforesaid suit of A. C. Horton, Governor, *v.* Charles Fenton Mercer and his associates, and to render and enter therein the aforesaid judgment and decree which it did render and enter therein as aforesaid.

Defendant alleges that the same identical subject-matter involved

in said suit in said District Court is involved in this cause and that the parties in interest are identically the same. Wherefore this defendant saith that the matter and things set forth in the original bill of complaint and the supplemental bill and bill of revivor are *res adjudicata* and barred.

All which matters and things this defendant doth aver to be true, and he pleads the said judgment and decree of the District Court of Navarro county to the said plaintiff's original bill and to his said supplemental bill and bill of revivor, and prays the judgment of this Honorable Court whether he should be compelled to make
41 any other or further answer to the said original and supplemental bill, and prays to be hence dismissed with his costs and charge in that behalf most wrongfully sustained.

GEORGE McCORMICK,
Attorney General,
AND WILLSON & GAINES,
Counsel for Defendant.

We the undersigned, counsel for the defendant, W. C. Walsh, hereby certify that the foregoing plea is, in our opinion, well founded in point of law.

GEORGE McCORMICK,
Attorney General,
AND WILLSON & GAINES,
Counsel for Defendant.

I, W. C. Walsh, defendant, solemnly swear that the foregoing plea is not interposed for delay, and that the said plea is true in point of fact.

W. C. WALSH.

Sworn and subscribed before me this 30th May, 1879.

M. HOPKINS, *Clerk.*

42 *Answer of W. C. Walsh, defendant.*

And afterwards, to wit, on the 31st day of May, 1879, the defendant Walsh filed his answer to the original bill and supplemental bill and bill of revivor of complainant, endorsed, to wit: "No. 98, Circuit Court of U. S., 5th Circuit and Western District of Texas; George Hancock v. J. J. Groos, Comm'r; Equity. Answer of W. C. Walsh, the defendant; filed May 31st, 1879. M. Hopkins, clerk."

In the Circuit Court of the United States, Fifth Circuit and Western District of Texas.

George Hancock, complainant,
No. 98. v. } In Equity.
J. J. Groos, defendant.

The answer of William C. Walsh, the defendant in the above-

named cause, to the original bill of complaint and the supplemental bill and bill of revivor of the plaintiffs.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said original bill, supplemental bill, and bill of revivor contained, for answer thereto, or to so much thereof as this defendant is advised it is matrerial or necessary for him to make answer to, answering saith:

I.

It is true as alleged in said supplemental bill that this defendant "is now the Commissioner of the General Land Office of the State of Texas, and is duly invested with and charged by law with all the rights and duties pertaining to said office in all respects as was his predecessor, the said Groos, the late Commissioner." Defend-
43 ant sayeth that as Commissioner of the General Land Office of Texas he has, in compliance with the requirements of the laws of said State, taken the oath of office prescribed by the constition of said State, and has executed bond for the faithful performance and discharge of the duties of such Commissioner. Defendant sayeth that under and by virtue of the constitution and laws of the said State of Texas the said office of Commissioner of the General Land Office of said State is an executive office, and that the duties with which that officer is charged involve the exercise of judgment and discretion and are not purely ministerial, and that the duties of said officer with regard to the matters and things mentioned and set forth in plaintiff's original and supplemental bills particularly involve the exercise of the judgment and discretion of that officer, and are by no means and in no part or respect of a ministerial nature. Wherefore this defendant sayeth that this court has no jurisdiction or power to restrain him as Commissioner aforesaid in his official action in relation to any of the matters and things complained of or mentioned in said original and supplemental bills, and has no jurisdiction or power to direct, command, control, or in any way interfere with his official action in regard to any such matters and things, and particularly has no jurisdiction or power to issue the process of injunction or mandamus against him as such Commissioner.

II.

This defendant sayeth that all the lands situated within the pretended limits of the colony called Mercer's Colony, as described and set forth in the plaintiffs' original bill, except such as have been granted, titled or patented under laws providing therefor, are the lands of the State of Texas, and are a portion of the public domain of said State, and as such are subject to location by the holders of

valid land certificates, and subject to be pre-empted by the citizens of the said State, under and by virtue of the laws of said State; and this defendant denies that the said plaintiffs or either of them have any right, title or interest in said lands or any of them, as claimed in their said original or supplemental bills, but that the same
44 belong to the State of Texas and are now possessed, controlled and used by the said State as a portion of her public domain, and that the said State of Texas is directly interested in the subject-matter involved in this suit, and is a necessary party to this suit. Wherefore this defendant sayeth that this court cannot proceed further herein for the want of a proper and necessary party hereto, to wit, the said State of Texas.

III.

This defendant admits, as charged in said supplemental bill, that as Commissioner aforesaid he has refused to issue and deliver to plaintiffs any of the land certificates claimed and demanded of this defendant as Commissioner aforesaid, and that as Commissioner aforesaid he has issued and delivered patents to lands situated within the pretended boundaries of said Mercer Colony to persons not claiming under or in privity with the contract of said Mercer; because this defendant sayeth that it would have been contrary to the laws of the State of Texas, a violation of his official oath, and a breach of his official bond for him to have done otherwise; and defendant sayeth that in so far as any locations have been made, or any patents have been issued, upon any of the lands situated within said Mercer Colony, the said plaintiffs have a full, perfect, and adequate remedy at law against the persons claiming said lands under or by virtue of said locations and patents, and this court therefore has no jurisdiction in regard thereto.

IV.

This defendant further sayeth that there are a number of persons occupying, cultivating, using, and enjoying lands within the limits of said Mercer's Colony, claiming said lands under locations made by them under laws of the State, and whose rights and interests in and to said locations are involved in this suit, and who are prevented from obtaining and receiving title to their said locations by reason of the injunction granted herein. Wherefore this defendant sayeth that said persons are proper and necessary parties in this suit, and this court has no jurisdiction or power to maintain said
45 injunction or to proceed further herein until said persons are made parties defendant herein.

V.

This defendant further sayeth that by the provisions of an act of the Legislature of the State of Texas, entitled "An act to require

the Governor of the State to countersign certificates for land hereafter issued from the General Land Office in certain cases," approved April 19th, 1879, it is not now within the power of this defendant, even were he otherwise so disposed, to issue and deliver to the said plaintiffs any of the land certificates claimed by them, unless the same are first countersigned by the Governor of this State; but, on the contrary, this defendant, as Commissioner aforesaid, is by the express terms of said act positively and peremptorily prohibited from issuing any land certificate whenever any doubt may arise as to the propriety of the issuance of the same, or whenever a suit may arise in any court whatever having for its object to compel or restrain the issuance of the same, except the said Commissioner is advised by the Governor to issue the same, and except such certificate is first approved and countersigned by the Governor of the State, as will more fully appear by reference to said act. Wherefore this defendant says that the Governor of the State of Texas is a proper and a necessary party defendant to this suit, and that the court has no jurisdiction or power to proceed further in this cause without the said Governor as a party defendant hereto.

VI.

This defendant sayeth that he admits, as alleged in original bill, that according to the terms of said contract between Sam Houston, President, &c., and Charles F. Mercer, of date 29 Jan'y, 1844, the said Mercer was bound to introduce and settle in Mercer's Colony within the period of five years from that date as many families as he could, at the rate of one family for every section of land, provided that not less than one hundred families were to be so introduced and settled each year; but defendant denies expressly that the said Mercer, or any one for him, did comply with and perform this condition of the said contract, and this defendant expressly avers
46 that the said Mercer and his associates did fail to introduce and settle in said colony as many families as the said Mercer could have introduced and settled therein, and did fail to introduce and settle in said colony as many as five hundred families during said five years, and did fail to introduce and settle in said colony as many as 100 families during each of said five years, as by the express terms and conditions of said contract he was bound to do. This denial is based upon the information and belief of the defendant.

VII.

This defendant expressly denies the allegation in said original bill, that the said Mercer entered into possession of lands in said colony, and surveyed and occupied the same according to law. This defendant sayeth that one of the express conditions of said contract was that the said Mercer should cause the lands within said colony

to be surveyed from time to time, and divided into sections of 640 acres and half sections of 320 acres, so far as the same might be practicable, &c., and that of such surveys the said Mercer should cause correct plats and copies of the field-notes to be made, denoting therein the ranges and number of the section or half section, and the fractional sections, &c., and the same, or a correct copy thereof, should be returned by said Mercer to the General Land Office of the Republic, which said condition in said contract this defendant avers to have been a material one and of much importance to the Republic and State of Texas, and which said condition in said contract this defendant expressly avers was never at any time by the said Mercer, or by any person for him, performed and complied with either in whole or in part; but, on the contrary, the said Mercer and those claiming under him have wholly and entirely failed to perform the said condition, and have never at any time had any of said lands surveyed in sections, half sections, fractional sections, or otherwise, and have never at any time returned to the General Land Office either of the Republic or State of Texas any maps, plots, surveys, or field-notes of any of said lands. This denial is based upon the information and belief of the defendant.

VIII.

47 Defendant further sayeth that, according to the true intent and meaning of said contract, it was obligatory upon said Mercer and his associates to apply to the Republic or State of Texas for an act of incorporation of said "Texas Association," but that the said Mercer and his associates did wholly fail and neglect to apply for said act of incorporation, and by such failure and neglect violated the said contract.

IX.

This defendant further sayeth that one of the express conditions of said contract was that the said Texas Association should, within six months from the date of said contract, and once within every six months thereafter until an act of incorporation should be obtained, transmit a list of their copartners and a statement of the share or shares of each in the stock or property of the association or company, and of the common name or title assumed by them, or a majority of them in interest, to the Department of State of said Republic of Texas. Defendant sayeth that the said Mercer and the said Texas Association and those claiming under them, as he is informed and believes, have failed to comply with and perform said condition in said contract. That said Texas Association has never at any time been incorporated, and that the only list of the copartners of said association and statement of the share or shares of each in the stock or property of said association, and of the common name of said

association, that was ever at any time transmitted to the State Department of either the Republic or State of Texas, was the paper referred to in plaintiff's supplemental bill as "Exhibit Q." Wherefore this defendant avers that the said Mercer and his associates and those claiming under them have failed to comply with and perform the said conditions in said contract.

X.

This defendant further sayeth that one of the conditions and stipulations of said contract was that the said Mercer and his associates should cause to be built from time to time as needed such number of log cabins, or small houses constructed of other materials, as circumstances should require, upon said lands, for the com-
48 fortable accommodation of each family introduced and settled by said Mercer and associates in said colony. And defendant avers that if the said Mercer and his associates ever did introduce and settle in said colony any family or families, (which is not admitted,) they did, as defendant is informed and believes, fail to cause to be built as needed for such family or families any log cabin or cabins, or other small houses, for the comfortable accommodation of such family or families as they were bound to do by the aforesaid condition and stipulation in such contract.

XI.

This defendant further sayeth that one of the conditions and stipulations of said contract was that the said Mercer and associates should cause each male emigrant of the age of 17 years and upwards to be supplied and bring with him a good rifle, yager, or musket, and a sufficient supply of ammunition. And defendant avers that he is informed and believes the said Mercer and associates failed to comply with and perform the said stipulation and condition in said contract, and did not supply and cause the emigrants into said colony who were males over 17 years, or any of them, to bring with them to said colony any such arms or ammunition.

XII.

This defendant further sayeth that it was one of the conditions and stipulations of said contract that the said Mercer and associates should keep on hand at all times, in some convenient place of deposit, such quantity of prime ammunition as would supply to each male emigrant of the age of 17 years and upwards, settled by them, not less than 100 rounds. Defendant avers that if the said Mercer and associates ever settled any emigrants under said contract, (which is not admitted,) he is informed and believes that they failed to comply with and perform said condition and stipulation in said contract, and failed

to supply said male emigrants over 17 years of age with said 100 rounds of ammunition, and failed to keep on hand at any convenient place of deposit, at any time, such quantity of prime
49 ammunition as would supply said male emigrants over 17 years of age with not less than one hundred rounds, according to the said condition and stipulation in said contract.

XIII.

This defendant further says that the Republic of Texas, by a joint resolution of her Congress, entitled "Joint resolution to establish the limits of the Mercer Colony," adopted February 3, 1845, required that the said Mercer and his associates should have the lines of their colony land actually surveyed and marked by the first day of April, 1845, and provided that a failure to comply with the said requirements should work a forfeiture of the said contract. Defendant avers that it is not true, as alleged in plaintiffs' supplemental bill, that the requirements of the said resolution were complied with by the said Mercer and his associates. Defendant is not informed and does not know that any of the lines of said colony were ever actually surveyed and marked by said Mercer and his associates, and defendant avers that there is no evidence in the General Land Office of Texas that any such survey was ever made. Defendant avers that the said pretended survey claimed by plaintiffs in their said supplemental bill, and evidenced as said plaintiffs claim by a certified copy of a map deposited in the office of the Secretary of State of this State, and referred to in said supplemental bill as "Exhibit E," if ever made, as he is informed and believes, was not made in accordance with
50 said contract and said joint resolution; and the said lines of said colony as designated in said contract were not the same as those which said plaintiffs claim were actually marked and surveyed, but were and are materially different, in this, that the said contract fixed the southern boundary of colony at a point on the Trinity River opposite to a creek known as "Cedar Creek," crossing said River Trinity at the lower bank of Cedar Creek, running thence to the mouth of Aquilla Creek on the Brazos River; but the southern boundary line of said colony as claimed to have been marked and surveyed by Mercer and associates, and as it appears upon the said pretended map marked "Exhibit E" as aforesaid, does not extend from the lower bank of said Cedar Creek on the Trinity River to the Aquilla Creek on the Brazos River, but commences at a small spring branch on the Trinity River, which said branch was never known as Cedar Creek, and was not the Cedar Creek mentioned and designated in said contract, and which said branch is about eighty miles below and south of said Cedar Creek mentioned and designated in said contract, and thence from said branch to the Aquilla Creek on the Brazos River, thus including in said pretended survey a region of country in a triangular shape containing 3,000

square miles more than was designated and set apart for said colony by the terms of said contract.

XIV.

This defendant further sayeth that the said Mercer Colony contract under which plaintiffs claim has long since been legally
51 declared, held, adjudged, and deemed to be forfeited, and null and void, by the proper judicial authority of the State of Texas, and in accordance with the constitution and laws of said State, to wit, that on the 25th day of September, A. D. 1845, in the District Court of Navarro county, in said State, in a suit in said court then pending, wherein the State of Texas, by her Governor, A. C. Horton, was the plaintiff, and the said Mercer and his associates were the defendants, and wherein was involved and at issue the validity and legality of said Mercer Colony contract, and whether or not the said Mercer and his associates had complied with and performed the terms, conditions, and stipulations of said contract, and whether or not the said contract had been forfeited by the said Mercer and associates, it was held, determined, adjudged, and decreed by said court upon the trial of said cause, that the said contract had been forfeited by said Mercer and associates, and was null and void, which said judgment and decree of the said court was then duly and legally rendered and entered, and the same has never been reversed, set aside, or in any manner invalidated, but is a valid subsisting judgment and decree at the present time, and is in full force and effect in law. Defendant avers that the said suit and proceedings therein in the said District Court of Navarro county were in all respects
52 authorized by and in conformity with the constitution and laws of the State of Texas; that the said District Court of Navarro county was, under the constitution and laws of said State, a court of competent jurisdiction to hear and determine said cause, and was a court of competent jurisdiction to adjudge and decree said contract to be forfeited and null and void, as it did do. Defendant further avers that a certified copy of said proceedings in said court in said cause and of the said judgment and decree rendered and entered therein by said court was on, to wit, the day of , a short time only after the rendition of said judgment and decree, deposited in the General Land Office of the State of Texas for the observance of said land office, and that the same has remained on deposit in that office to the present time, and is now on deposit there, and that the said judgment and decree of said court has been recognized by each and all of this defendant's predecessors in said office of Commissioner of the General Land Office as valid, legal, binding, and final, and has been so recognized by this defendant, and he believes by all other departments and officers of the government, and he still so regards it, and he has never at any time heard the validity, legality, and conclusiveness of the said judgment or decree doubted or called in question until the institution of this suit.

XV.

This defendant further sayeth that the plaintiffs' cause of action, if any they ever had, accrued more than ten years before the filing of said original bill of complaint, and that by the provisions of the laws of the State of Texas his said action is barred by limitation.

XVI.

This defendant further sayeth that the State of Texas has openly, notoriously, and adversely to all the world claimed, occupied, used, controlled, and from time to time disposed of the vacant lands within the limits of said Mercer's Colony, now claimed by plaintiffs, from, to wit, the 27th day of August, 1845, down to the present time, and still so claims, occupies, uses, and controls the same, and that during all of said time the said State has, through her officers and agents, openly and notoriously claimed and controlled and disposed
53 of said lands exclusively and adversely to said Mercer and his associates, or those claiming under them. Wherefore this defendant sayeth that if the said plaintiffs ever had any rights under said contract, the same are stale, and that said plaintiffs, and those under whom they claim, have long since lost all right to maintain an action upon said contract by their own laches and a failure to prosecute said action within a reasonable time.

XVII.

This defendant further sayeth that neither the said Mercer or his associates or any of his or their agents, assignees, trustees or legal representatives, ever applied to or demanded of the Commissioner of the General Land Office of the State of Texas any of the land certificates now claimed by plaintiffs for a period of thirty years after the said Mercer's and associates' rights thereto, if any they ever had, accrued, and during the whole of said period of time the General Land Office of Texas was in full and complete operation in the city of Austin, State of Texas, and was transacting the land business of said State; and during the whole of said time the said State was openly, exclusively, notoriously and adversely claiming, holding, controlling, and disposing of the said vacant lands in said colony, and the said General Land Office did during the whole of said time openly and notoriously recognize the said lands in said colony as vacant and unappropriated and open for settlement and location, and did receive locations thereon and issue patents upon such locations to various persons who went into open and notorious possession and occupancy, use, and cultivation of the lands so located by them, claiming the same adversely to the world and paying taxes thereon; and these facts were well known all the while to the said Mercer and his associates and those claiming under them; and yet the said Mercer and associates and

those claiming under them did fail and neglect for a period of thirty years to assert their rights, if any they had, in the courts of the country, and without having any legal, equitable, or valid excuse for such laches.

XVIII.

This defendant further sayeth that if the said State of Texas was ever at any time a trustee for said Mercer and associates
54 under said contract as alleged by plaintiffs, which is not admitted, the said trust has long since ceased, expired, and been determined, to wit: it expired, ceased, and was determined by the several failures hereinbefore recited of the said Mercer and associates to comply with and perform said contract, to wit: it ceased, expired, and was determined by the express provisions of said contract at the expiration of five years from the date of said contract, to wit: it ceased, expired, and was determined by the judgment and decree of the District Court of Navarro county declaring said contract forfeited and null and void; and the said trust, if any ever existed, has not existed for more than thirty years prior to the filing of the original bill of complaint herein. Wherefore defendant sayeth that if the plaintiff ever had any cause of action upon said contract the same is stale and is barred by the laws of limitation.

XIX.

This defendant further sayeth that it is not true, as alleged by plaintiffs, that the said Mercer and associates complied with and fully performed all the conditions, terms, and stipulations of the said colony contract; but, on the contrary, this defendant avers that the said Mercer and associates did fail and neglect to comply with and perform the conditions, terms, and stipulations of said contract and with the laws of the State in regard thereto, and by said failure and neglect did forfeit the said contract and all rights and claims thereunder. This statement is made upon information and belief.

XX.

Defendant further sayeth that the pretended map of the survey of the said colony lines of which Exhibit E accompanying plaintiffs' original bill purports to be a copy, and which pretended map is on deposit in the office of the Secretary of State of this State and of date May 1st, 1845, this defendant charges and believes to be antedated and surreptitiously placed on deposit in said Secretary of State's office. The said pretended map has all the appearances of being of recent manufacture, and the paper or material of which the same is made looks fresh and new and presents no indication whatever of age, and this defendant believes and charges that the said pretended

map was manufactured just before the filing of the plaintiffs'
55 original bill surreptitiously, and without the knowledge of the Secretary of State deposited in the office of the said Secretary of State, there being no file or other mark upon said paper to indicate the time when said paper was deposited in said office.

XXI.

This defendant further sayeth that he is informed and believes that it is not true as alleged by plaintiffs that the said Mercer and associates introduced and settled in said colony within 5 years from the date of said contract 1,256 families, and the archives of this State show that they did so introduce and settle that number of families. The only evidence existing in said archives that said Mercer and associates ever introduced and settled any families in said colony is the paper of which "Exhibit B," accompanying plaintiffs' original bill, is a copy, and this paper this defendant believes and charges to be false and fraudulent, and to have been obtained and manufactured through and by fraud and misrepresentation on the part of said Mercer and associates, and that in fact and in truth the said Mercer and associates did not introduce and settle as many as 100 of the families therein named, and had not in fact and in truth complied with and performed the terms and conditions of their said colony contract up to that time as therein stated and made to appear.

XXII.

This defendant further sayeth that he is informed and be-
56 lieves that it is not true, as alleged in plaintiff's original bill, that the said Mercer and his associates were obstructed, hindered, delayed, prevented and interfered with in the performance of the terms and conditions of their said contract by lawless and turbulent men and by the legislation of the government. Defendant is informed and believes and so avers that the said Mercer and associates were at no time and in no way obstructed, delayed, prevented, hindered or interfered with in the free and full performance of the stipulations, terms and conditions of their said contract, by either the Republic or the State of Texas, or by the officers, agents or citizens of either, but the failure of said Mercer and associates to perform the said contract was due to their own neglect, and that said failure resulted greatly to the damage of the said Republic and State of Texas.

XXIII.

This defendant further sayeth that it is not true, as alleged by plaintiffs, that no legal method or procedure was ever provided by the government of Texas to ascertain the forfeiture of said contract, and to declare and adjudge the same to be forfeited; but that, on the

contrary, the ordinance of the constitutional convention of the people of Texas, adopted 27th day of August, 1845, and hereinbefore referred to, did expressly and clearly and amply provide said method and procedure, and that under and by virtue of the provisions of said ordinance, and in accordance therewith, the said con-
57 tract was duly and legally declared, adjudged, and decreed to be forfeited and null and void by the District Court of Navarro county, Texas, as hereinbefore shown.

XXIV.

And this defendant submits to this honorable court that all and every of the matters in said plaintiffs' original and supplemental bills mentioned and complained of, are matters which may be tried at law, and with respect to which the said plaintiffs are not entitled to any relief from a court of equity, and this defendant hopes he shall have the same benefit of this defense as if he had demurred to the said plaintiffs' original and supplemental bills. And this defendant denies all and all manner of unlawful act or omissions wherewith he is by the said original or supplemental bill charged; without this, that there is any other matter, cause, or thing in said plaintiffs' said bills contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, is true to the knowledge or belief of defendant; all which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

GEORGE McCORMICK,
Attorney-General,
58 AND WILLSON & GAINES,
Counsel for Defendant W. C Walsh.

THE STATE OF TEXAS, }
Travis County. }

On this the 30th day of May, A. D. 1879, before me personally appeared William C. Walsh, and made oath that he had read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

W. C. WALSH.

Sworn and subscribed before me this 30th May, 1879.

M. HOPKINS, *Clerk.*

Motion of Walsh to Dissolve Injunction.

And afterwards, to wit, May 31st, 1879, defendant Walsh filed his motion to dissolve the order of injunction, endorsed, to wit: "No. 98. Circuit Court of U. S., 5th Circuit and Western District of Texas. George Hancock *vs.* J. J. Groos, Comm'r, &c. Equity Motion of W. C. Walsh, the defendant, to dissolve the order of injunction in this cause granted. Filed May 31st, 1879. M. Hopkins, clerk."

In the Circuit Court of the United States, Fifth Circuit and
59 Western District of Texas.

George Hancock, complainant,
v. } In Equity.
J. J. Groos, Comm'r, &c., def't.

The motion of William C. Walsh, the defendant, to dissolve the injunction in this cause granted and issued.

And now in the above-entitled cause comes the defendant, William C. Walsh, and moves this court to dissolve, set aside, and vacate the order of injunction herein granted by this court on the 19th of April, 1879, for the reasons and causes following, to wit:

1st. Because this court has no jurisdiction or power to restrain or in any manner control the official decision, judgment, and acts of this defendant as Commissioner of the General Land Office of the State of Texas.

2nd. Because this court has no jurisdiction of this cause.

4th. Because it is apparent from the record that there is a want of necessary parties defendant to this suit, and that the parties whose interests are really involved in this cause are not before this court.

5th. Because the plaintiffs have a complete, plain, and adequate remedy at law for the matters complained of in their original and supplemental bills, if they are entitled to any remedy at all.

6th. Because the original and supplemental bills of plaintiffs nor either of them are supported by affidavits or other sufficient evidence.

7th. Because the said original and supplemental bills of plaintiffs do not show any facts which entitle them to any equitable relief whatever.

8th. Because the said order of injunction was granted by
60 this court upon a false and mistaken statement of the facts made by the plaintiffs in their said original and supplemental bills.

9th. Because the material facts and equities set forth in plaintiffs' original and supplemental bills have been fully answered and denied by the answers of this defendant filed herein.

10th. Because of other errors manifest from the record in this cause.

GEORGE McCORMICK,
Attorney General,
AND WILLSON & GAINES,
Counsel for Defendant.

Complainant's Motion to strike Disclaimer, &c., from files.

And afterwards, to wit, the 27th day of June, 1879, the complainant Preston filed his motion to strike disclaimer, &c., from files, endorsed, to wit: "98. Hancock *v.* Groos. Motion to strike disclaimer, &c., from files. Filed June 27th, 1879. M. Hopkins, clerk."

U. S. Circuit Court, Western District of Texas, Austin.

George Hancock's executors, &c.,
No. 98. v. } In Equity.
Wm. C. Walsh, Commissioner, &c.

And now at this day comes the complainant, William Preston, by his solicitors, Hancock, West & North, and moves the court to enter an order directing that the following papers filed in said cause by the defendant be taken and stricken from the files in said cause, to wit:

1. A disclaimer of the defendant, W. C. Walsh, filed on the 31st of May, A. D. 1879, because prior thereto the said defendant had appeared and demurred to complainant's bill, as appears from the records and orders in said cause.

2. Also a demurrer to complainant's bill filed by said defendant on the 31st day of May, A. D. 1879, because said defendant had already demurred to said bill, and because on the 31st day
61 of May, A. D. 1879, said defendant answered to the merits of the whole bill, thereby waiving his demurrer.

3. Also a plea of *res adjudicata* and other matters filed on said 31st day of May, A. D. 1879, because an answer to the whole bill was filed by said defendant on said 31st day of May, A. D. 1879.

And complainant also sets this motion down for hearing on the rule day in August, 1879.

HANCOCK, WEST & NORTH,
Sols. for Complainant.

Petition for Leave to File Amended Bill.

And afterwards, to wit, on the day of , the complainant Preston presented to the court his petition for leave to file amended

bill, endorsed, to wit: "No. 98, Chcy. U. S. C. Ct. West. Dist. Texas, Austin. Hancock *vs.* Groos. Petition for leave to file amended bill."

United States Circuit Court, Western District of Texas, at Austin.

George Hancock, complainant,
No. 98. *v.* } In Chancery.
J. J. Groos, Defendant.

In Chambers.

To the Hon. W. B. Woods, United States Circuit Judge for the Fifth Circuit:

The humble petition of William Preston, devisee, &c., of George Hancock, deceased, and the present complainant in the above-styled bill of complaint, showeth unto your Honor:

That heretofore your petitioner, having filed his bill of complaint in this court against the above-named defendant, J. J. Groos, and the said J. J. Groos having departed this life pending said cause, and one Wm. E. Walsh having been duly made a defendant herein
62 in the place of said J. J. Groos, and the said defendant W. E. Walsh having on or about the day of , A. D. 18 , filed his answer herein to said bill, to which answer no replication has been filed by your petitioner, and said answer being now on file; your petitioner is advised that by reason of the matters set up in said answer, in order that the court may do equity in the premises, it is necessary that he should, in certain matters, amend his said bill of complaint.

Your petitioner further says that this petition is addressed to your Honor for the reason that the District Judge presiding in this court, having at one time been of counsel in the matters in controversy in said cause, is disqualified by law from entering any orders therein.

Your petitioner further says that he has delayed this application until this time in the hope that some judge would preside in said court who was not disqualified from acting herein.

Your petitioner humbly prays that he may be now at liberty to amend his said bill as he shall be advised, without costs and without prejudice to the writ of injunction heretofore granted herein. And your petitioner will ever pray, &c.

WILLIAM PRESTON,
Complt.

HANCOCK, WEST & NORTH,
Sols. for Complt.

Order Granting Leave to File Amended Bill.

And afterwards, to wit, the 18th day of December, 1879, the complainant's petition for leave to file his amended bill coming on to be

heard, an order granting leave to file amended bill was made by Judge W. B. Woods, at Chambers, Montgomery, Alabama, endorsed, to wit: "Filed Dec. 24, 1879. M. Hopkins, clerk."

63 In the Circuit Court of the United States for the Western District of Texas, at Austin.

98. Hancock *v.* Groos. } In Equity.

Upon hearing the motion of the complainant, Wm. Preston, for leave to file the amended bill of complaint by him now exhibited to the court, and it being considered that the filing of the same should be permitted, it is now ordered that said motion be and is sustained, and it is ordered that said amended bill of complaint be filed, and the clerk is directed to file the same. The said filing to be without costs to said complainant.

And it is further ordered that the complainant may file said amended bill and serve notice of such filing upon the defendant or his solicitors, and if such filing and notice be had before the January rules, 1880, the defendant shall appear by plea, answer, or demurrer to said amended bill at or before the February rules, 1880.

And the leave to file said amended bill is without prejudice to the order of injunction in this cause heretofore entered.

At Chambers, Montgomery, Alabama, December 18th, 1879.

W. B. WOODS, *U. S. Judge.*

Complainant's Amended Bill.

64 And afterwards, to wit, the 24th day of December, 1879, the complainant Preston filed his amended bill, endorsed, to wit: "No. 98. In Circuit Court U. S., West. District, Texas, Austin. Hancock *v.* Groos. Amended Bill. Filed December 24, 1879. M. Hopkins, clerk."

In the Circuit Court of the U. S. for the 5th Circuit, District of Western Texas.

Hancock *v.* J. J. Groos, Land Commissioner, &c. } Amended bill of complaint.

The amended bill of complaint of the complainant, William Preston, a citizen of the State of Kentucky, in whose name as complainant this cause has heretofore been revived against W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and a citizen of the State of Texas, humbly complaining showeth unto your Honors, the Judges of the Circuit Court of the United States

in and for the circuit and district aforesaid, your orator, William Preston, in whose name this cause has heretofore been by order of this court revived.

That your orator now by leave of this court comes and amends the original bill of complaint and the bill of revivor and of supplement hereinbefore filed, and for amendment says and charges:

That each, all, and every the charges and allegations contained in said original bill and the bills of revivor and of supplement are true, and all the facts therein and in each and every of them contained and charged are true, and the truth of the same this complainant will maintain and prove.

And further your orator says and charges that by force of
65 the grant from the Republic of Texas unto Charles Fenton Mercer, as in the said original and bills of revisor and of supplement, and the several exhibits therewith filed, is shown, there was created an express grant of all the lands theretofore unappropriated within the boundaries of the colonial grant to Mercer, for the benefit of said Mercer and his associates and those claiming under him, and by force of said grant and the trust thereby created all the domain within said colonial limits was set apart for the satisfaction of said contract. And further your orator charges that the trust as to the delivery of certificates and evidences of title as to the lands within the said colonial boundaries has never been satisfied, executed, abandoned, or released, nor the rights of your orator and his associates, and of Hancock and Mercer satisfied, nor the trust as to them been performed by the ministerial officers charged by law with the duty of executing and performing such trust. And your orator further charges that the said grant to Mercer and the said contract of Mercer with the Republic of Texas was in all respects valid, and did constitute and was a liability of the Republic of Texas, and has never in any wise been satisfied, paid, or discharged, in whole or in part, unto said Mercer or his associates, or any of them, or the late George Hancock, or to your orator.

And your orator charges that by and in the resolutions and articles of annexation, whereby the Republic of Texas was annexed to and became one of the United States of America, and which said resolutions and articles were in due and proper form assented to and accepted as well by the United States of America as by the Republic of Texas,
it was expressly declared, stipulated, and agreed between the
66 high contracting parties, to wit, by the United States of America, of which country and jurisdiction the said Charles Fenton Mercer was a citizen and subject, and the Republic of Texas, that the State of Texas when formed out of the Republic of Texas should, when admitted into the Union, retain all the public funds, debts, taxes, and dues of every kind, which at the time of said annexation might belong to or be due and owing to said Republic; and should also retain all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands after discharging said debts and

liabilities to be disposed of as said State might direct. Your orator charges that the contract of Mercer with the Republic of Texas was at the time of said annexation, agreement, and stipulation a liability of the Republic of Texas, and was within the purview and intent of the same, and he charges that all the then vacant and unappropriated lands lying within the boundaries of the Republic of Texas, and every part of all such then vacant and unappropriated lands, became and were bound by and included within the stipulation of the annnexation, so as to be, and the same were, retained by the State of Texas to be applied to the payment of the debts and liabilities of the Republic of Texas, and became, and were and ever since have been, a trust fund and estate held in express continuing and subsisting trust for the payment of such debts and liabilities, including the liability of Mercer and his associates, and to your orator and the Texas Association.

67 Your orator charges that out of the said trust of vacant and unappropriated lands various debts and liabilities of the Republic of Texas have been satisfied, including a number of colonial contracts similar in all respects to the contracts of Mercer; and to the best of your orator's information, derived from diligent inquiry, all the debts and liabitities chargeable upon said trust lands have been satisfied, save only the contract of Mercer.

Your orator charges that the liability of such vacant and unappropriated lands retained by the State of Texas at the time of annexation as aforesaid in trust as aforesaid has been well recognized by the State of Texas, and more especially has such trust and liability to and for the satisfaction and discharge of colonial contracts and certificates of land based upon them been recognized by said State in a certain act of its General Assembly approved on the 12 August, 1870, wherein and whereby it was provided that all colonial certificates might be located and all valid colonial claims might be located outside the limits of the respective colonial grants and upon any part of the public domain and upon any part of the vacant and unappropriated lands aforesaid.

Your orator charges that at the time of the annexation of Texas to the American Union, and of the stipulation and agreement and articles of annexation aforesaid, there were within the limits of the former Republic of Texas and of the State of Texas more than two hundred million acres of vacant and unappropriated lands, over and above and exclusive of the lands included within the boundaries of the grant to Mercer and other colonial grants; and he charges that

68 every part of the same was accepted, received, and retained by the State of Texas under and by virtue of and subject to the stipulations of the articles of annexation aforementioned, and every part of the same was accepted, received, and retained by the State of Texas, charged with the express and continuing trust for the payment and satisfaction of the liabilities of the Republic of Texas, including the grant to Mercer and the rights of Mercer and his associates and assigns under said grant.

Your orator charges that the rights of Mercer and his associates and assigns and of your orator and of the Texas Association were and are secured by the force of the grant to Mercer so far as the land included within the colonial limits are concerned, and were and are further secured to them by the express trust declared in the articles of annexation as aforesaid as to all lands which at the time of the annexation were vacant and unappropriated.

Your orator further charges that at the time when Mercer concluded his contract with the Republic of Texas the same was authorized, guaranteed, and protected by the constitution of the Republic of Texas then in force and by the laws of said Republic, and that there then were in force no law or method for determining how lands should be forfeited or land grants repealed or cancelled or possession resumed by the Republic of Texas so as to re-annex the Mercer Colony lands to the public domain of Texas, and no such law was ever passed prior to the admission of Texas into the Union or up to the time of the creation of the trust upon the public domain as hereinbefore stated. He charges that it never was the true intention or purpose of the deputies of the people of Texas in convention assembled to declare any forfeiture of the colony contract or to establish by constitutional enactment any method for determining what lands, if any, might have been forfeited, or how forfeitures should be declared, and no such declaration was made by said convention authorizing any proceedings to forfeit the Mercer grant or any colonial contract.

Your orator avers and charges that from the time of the annexation of Texas to the Union up to the present time the Legis-
69 lature of Texas has not provided a method for determining what lands may have been forfeited. He charges that no method has ever been provided by the constitutional convention of 1845 of the State of Texas or by its Legislature at any time to revoke the grant of Mercer or to repeal the same, or to resume the lands granted, or to re-attach the said lands to the public domain, or to authorize any officer so to do, or to re-enter on said lands or any part thereof in behalf of the State of Texas, or to enforce any forfeiture thereof, or to evict and oust Mercer and his associates therefrom, or disturb his or their peaceable possession of said lands.

Your orator charges that notwithstanding the grant to Mercer, as in the original bill and bills of revivor and supplement, and their several accompanying exhibits, as well as hereinbefore set forth, and notwithstanding the rights of your orator and the Texas Association under and by virtue of said grant, the defendant Walsh and his predecessors, Land Commissioners of the State of Texas, has, without warrant of law and contrary to law, assumed and pretended to make, issue, and deliver to numerous persons, strangers to your orator, and not claiming through, or under, or in privity with the rights of Mercer and his associates and assigns, certificates for land, and patents for lands within the limits and boundaries of said Mercer Colony, and by such wrongful and illegal acts great numbers of

innocent persons, not conscious of the injury thereby done to your orator and the Texas Association, have been induced to pay money and render services for such certificates and patents, and to bestow labor and to expend money for such certificates and patents, and to bestow labor and expend money upon the lands pretended to be conveyed to them, and said wrong has been pursued to so great an extent that the lands within the limits of Mercer's Colony now remaining and not claimed under such pretended certificates and patents are now and at this time wholly inadequate to satisfy the just demand and right of your orator and the Texas Association.

Your orator says that he and his associates are very unwilling, by multitudinous actions, to disturb or evict those who hold such certificates and patents, and have so expended their labor and money on the faith of them, being deceived and misled by the wrong-
70 ful acts of the defendant and his predecessors, and that very great hardship and suffering would result from so doing. He charges that defendant Walsh, Land Commissioner of the State of Texas, though enjoined by the writ of this court in this cause heretofore granted, issued and served upon him, from issuing or delivering, or permitting to be issued or delivered, any certificate or certificates for land, or patent or patents for lands within the boundaries of Mercer Colony, has continued and now continues, and avows his intent still to continue, to issue and deliver to persons and corporations other than your orator and the Texas Association, and those in privity with them, such certificates and patents, to the constant and greater diminution of the lands within said boundaries unoccupied and available. And your orator charges that the said action of defendant Walsh is in open and avowed contempt of the injunction of this court, and is part and parcel of a deliberate and purposed combination, confederation, and conspiracy to impede the administration of justice in this honorable court, and to obstruct the valid and lawful orders, writs and judgments of this court.

And the said defendant Walsh, Land Commissioner as aforesaid, notwithstanding the trust attaching to and binding upon all the vacant and unappropriated lands within the limits of the State of Texas as they were at the time of the annexation as aforesaid, and notwithstanding that said lands and every part of them are and have ever been since said annexation in express continuing and subsisting trust to secure the payment and discharge of all the liabilities of the late Republic of Texas, including the claim of your orator, does persist in attempting to alienate the same, and is daily and hourly issuing certificates and patents for the same in great and small quantities, and is now preparing to issue certificates for several millions of acres without lawful authority so to do unto divers parties not in privity with your orator, and without first issuing to your orator the certificates necessary and proper to liquidate and discharge and pay the claim of your orator and the Texas Association.

Your orator says that said contempt of your Honors' judg-
71 ment and order, and of the writ of injunction herein, and continued attempted diminution of the public domain, with-

out first discharging the trust aforesaid, is the result of and part of a combination and conspiracy by and between the said defendant Walsh and the Honorable O. M. Roberts, Governor of the State of Texas. Your orator charges that immediately upon the granting of the writ of injunction herein, to wit, on the 19th day of April, 1879, the defendant Walsh and said O. M. Roberts, Governor of the State of Texas, did procure certain legislation, whereby it was made the duty of the Governor of the State of Texas to countersign certificates for lands issued thereafter from the General Land Office of said State, and the said O. M. Roberts, as Governor of the State of Texas, approved said act, and, as your orator is advised and charges, prompted and instigated the passage thereof. The intent and object and effect of said act was, as your orator charges, intended to be, and is, and has been to embarrass your orator in the assertion of his just rights and to obstruct the administration of justice, and more especially to impede the due and proper course of justice in this court in this cause.

And under said pretended act and its pretended requirements and authority the defendant Walsh, Land Commissioner of the State of Texas, is constantly issuing, preparing, and delivering, and the said O. M. Roberts, Governor of the State of Texas, is constantly countersigning and abetting in and consenting to and advising the preparation, issuing, and delivering of certificates for lands and patents for lands within the boundaries of Mercer's Colony to persons not privity with your orator or the Texas Association, in contempt and defiance, purposed and avowed, of the injunction of this court in this cause heretofore granted; and under said act and its pretended requirements and authority the defendant Walsh, Land Commissioner of the State of Texas, is constantly issuing, preparing, and delivering, and the said O. M. Roberts, Governor of the State of Texas, is constantly countersigning and abetting in and consenting to and advising the preparation, issuing, and delivering of certificates for land and patents for land, embracing parts of and located upon the public domain charged with the trust aforesaid.

72 Your orator has not knowledge or information sufficient to state how much of the land within the limits of the grant to Mercer has been attempted to be aliened by certificates and patents by the defendant Walsh, Land Commissioner of the State of Texas as aforesaid, and his predecessors in office, or what specific parts of said lands has been attempted to be aliened, or what has been attempted to be taken up or occupied or claimed under such certificates and patents by parties not in privity with the grant to Mercer or claiming under it; but he charges that the defendant Walsh has in his possession and control full, complete, and perfect knowledge and information of and concerning the same, and full and perfect plats and maps of the same, and lists in detail showing the date of issue of each and every such certificates and patents and the names of the persons to whom issued and delivered. And more especially has the said defendant full, perfect, and complete lists,

maps, and records of each and all the certificates, patents, maps, plats, and other evidences of title to lands within the boundaries of Mercer Colony, prepared, issued, and delivered by him and under his sanction, authority, and advice since the date of the granting, issuing, and service upon him of the writ of injunction in this cause granted and issued, commanding him and his subordinates, employees, clerks, draftsmen and others in said writ of injunction named to desist and refrain from any such issue or delivery or procurement thereof.

And your orator charges that a discovery and a full disclosure thereof by the defendant Walsh is necessary to the just and perfect ascertainment and adjudication of your orator's rights in this cause. And your orator has not knowledge or information as to what lands within the boundaries of said Mercer's Colony did, at the time of the service upon defendant of the writ of injunction herein, remain unaffected by any of the pretended certificates, patents, or other papers issued or delivered by defendant or his predecessors in office, or what of said lands now remain unaffected by any such;
73 but the defendant has full, complete, and accurate knowledge and information and complete and accurate maps of and documents showing precisely every particle of land within the limits and boundaries aforesaid, to or for which no certificate or patent had at the date of service of said writ of injunction been issued or delivered, or have as yet been issued or delivered or recorded; and your orator charges that a full and complete disclosure and discovery of each and all the said facts and particulars is essential to a just understanding of the rights of your orator and to a perfect and just ascertainment and adjudication of your orator's rights herein.

Your orator charges that by reason of the wrongful issue and delivery of certificates and patents pretending to cover and make title to lands within the boundaries of said Mercer's Colony by the defendant and his predecessors, land commissioners as aforesaid, to persons not in privity with the grant to Mercer, a great number of persons not in privity with your orator or with Mercer's grant have, under color and authority of such wrongful certificates and patents, assumed to occupy and claim lands within said colony boundaries, leaving not enough land unclaimed to satisfy the claim of your orator and the Texas Association.

Your orator charges that the lands within the boundaries of Mercer's Colony are among the most valuable in the State of Texas, and command a high price per acre, to wit, not less than an average price of five dollars per acre, and are well worth that price, and would now be worth that price to your orator and the Texas Association if they were in possession of their certificates, wrongfully withheld by defendant; but the vacant and unappropriated lands (exclusive of colonial grants) as they existed at the time of annexation, are not worth in the market, so far as they are now open to location, a sum of more than fifty cents per acre.

And your orator says that the right of himself and the Texas

Association to have satisfaction of their claim and demand under and by virtue of the contract with Mercer out of and by conveyance of lands situated within the colonial boundaries is very important and valuable to them by reason of the greater value of said lands and their more desirable situation; and that certificates for other and different lands out of the public domain of Texas would not be adequate to satisfy and recompense their said claim and right unless a sufficiently greater quantity of land be conveyed or certified to make the same equal in value to the thirteen hundred and seventy-six (1376) sections of land within the said colonial boundaries to which your orator and his associates are entitled as aforesaid; and he says and charges that all the delay, trouble, and difficulty of now making satisfaction to your orator and his associates of their rights under the grant to Mercer arise and have arisen by the wrongful and unlawful acts of defendant and his predecessors, Commissioners of the General Land Office of the State of Texas, in assuming and pretending to sell, issue, and deliver certificates and patents to lands situated within said colonial boundaries to persons not entitled thereto in defiance of the rights of Mercer and those claiming under him, and by said wrongful acts the lands have been encumbered and the remedy of your orator greatly embarrassed and obstructed, so that, as he greatly fears, he will be forced to look to the trust upon the public domain afore described for remedy, and to be satisfied by certificates of lands to be located thereon.

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And your orator is advised and charges that by the principles of law and in equity and good conscience, if the said contract with Mercer cannot be satisfied and performed from the lands within the boundaries of Mercer's Colony by reason of the facts aforesaid, he is entitled under said contract to have relief by the issue of land certificates to be located, surveyed, and patented according to the laws of Texas from the public domain of Texas now subject to location, survey, and patent, so as to give to him lands of equal value in recompense, instead of and for those wrongfully or by mistake aliened and encumbered by the locations, surveys, certificates, and patents issued by the defendant Walsh, Commissioner of the General Land Office of the State of Texas, and his predecessors in office. Further your orator says and charges that at the time of the annexation of Texas to the United States by the Constitution and laws of Texas it was provided that a General Land Office should be established, where all the land titles of the Republic should be registered, and at that time the contract with Mercer was there duly registered, and that the whole territory of the Republic should be surveyed in such manner that the officers of the government or purchasers should be enabled to ascertain with certainty the lands that were vacant, and which had been from time to time covered by location, surveys, and valid titles. That pursuant to the provisions of said Constitution the Congress of Texas did on the 14 December, 1837, pass an act providing for the establishment of a General Land Office to be located at the seat of government, or at such place as should

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be thereafter designated by law, the chief officer of which should be denominated the Commissioner of the General Land Office, and also providing for designating the manner of his appointment and the amount and character of the bond to be executed by him for his faithful performance of the duties of his office. That the said office of the Commissioner of the General Land Office so established by law has been by law continued until the present time, and that the powers and duties of the person or officer administering said office have been from time to time prescribed and defined by the statutes of said State and the decisions of the courts of said State. That section 1 of an act of the legislature of said State passed on the 12th day of April, 1846, and entitled an "Act to establish a General Land Office for the State of Texas," provides that there shall be established a General Land Office to be located at the seat of government of the State of Texas, the chief officer of which shall be styled
76 the Commissioner of the General Land Office, whose duties it shall be to superintend, control, and direct the official conduct of all subordinate officers of the General Land Office, and to execute and perform all acts and things touching or respecting the public lands of the State of Texas or rights of individuals in relation thereto as may be required of him by law. That section 1 of an act of said legislature passed on the 6th day of March, 1863, entitled "An act to authorize the Commissioner of the General Land Office to issue to all persons and corporations such land certificates as they may be entitled to receive under any general or special law of the State," is in the words following, to wit: "The Commissioner of the General Land Office be, and he is, hereby authorized to issue to all persons and corporations such land certificates as they may be entitled to under any general or special law of the State."

And that section 2 of an act of said legislature entitled "An act requiring the Commissioner of the General Land Office to issue patents in the name and by the authority of the State of Texas" is in the following words, to wit: "All patents for lands emanating from the government shall be in the name and by the authority of the State, and under the seals of the State and the General Land Office, and shall be signed by the Governor and countersigned by the Commissioner of the General Land Office."

And your oratior says and charges that by force of the constitution and acts aforesaid the Commissioner of the General
77 Land Office was required and commanded to execute and perform all acts and things respecting the just and equitable execution of the contract entered into between Charles Fenton Mercer and the Republic of Texas aforesaid, and that he, the said Commissioner, was authorized and required by law to issue to said Charles Fenton Mercer and his associates the land certificates and evidences of title within said colony boundaries according to the terms and provisions of said contract, and after receiving the reports of said Mercer of the faithful performance of the same, from time to time, and causing them (without any objection for non-performance

of conditions) to be recorded among the archives of the State; but, notwithstanding the said duty so imposed by law, the defendant, Commissioner of the General Land Office of the State of Texas, and his predecessors in office, well knowing of the reception of such reports from said Mercer and of the full performance of the contract as in such reports averred and declared, and of the reception and recording of such reports by the State of Texas and its authorized officers, and of the fact that no objection was taken to said reports or suggestion of inaccuracy in any one or more of them, at any time, to Mercer or his associates, made or intimated, and of the fact that certified copies were to the office of the Commissioner of the General Land Office, furnished by and from the office of the Secretary of the State of Texas and there filed as archives, did refuse, and have always refused, and defendant Walsh still refuses, although often thereto requested to perform the legal duty of preparing the evidence of title, so that legal patents for said lands might emanate therefor from the government in the name and by the authority of the State,

78 and under the seal of the State and of the General Land Office, duly signed by the Governor and countersigned by the Commissioner of the General Land Office as required by law.

Your orator charges that it is the ministerial duty of the defendant Walsh, Commissioner of the General Land Office of the State of Texas, to prepare and sign with his official signature and authenticate with his official seal all and every the land certificates to which your orator and the Texas Association are entitled as aforesaid, so that the same, when so prepared, signed and authenticated, may be perfected by the further official acts of the Governor of the State and other officers, as by law is prescribed, and proper and conclusive evidence of the title issued and delivered, and the same duties are plain and are prescribed by law to be performed by the defendant and by every his successor in the office of Commissioner of the General Land Office of the State of Texas.

And your orator charges that until the defendant, as Land Commissioner as aforesaid, shall have first prepared, signed, and sealed the land certificates as aforesaid, there is no duty of preparation signature, countersignature, or issue or delivery, imposed upon any other officer of the State of Texas.

Yet the defendant Walsh, Commissioner of the General Land Office of the State of Texas, though often thereto requested, has ever refused, as did his predecessor, and still refuses to prepare, sign, authenticate, seal, or order the preparation of, or permit to be prepared for signature and completion, any one or more of the land certificates to which your orator is entitled as aforesaid.

79 Your orator states and charges that neither the Republic of Texas nor the State of Texas have ever by any constitutional or legislative act, or by any ordinance or resolution, or by any proclamation of any authorized officer, or by any legal proceedings of any authorized officer or court of competent jurisdiction, forfeited or attempted to forfeit the land grant made to Charles Fenton Mercer

and his associates, nor has said grant ever been annulled or revoked by any act of the people or government of Texas.

Your orator prays that all the exhibits attached to or filed with the original bill of complaint herein and the bill of revivor, and the bill of revivor and supplement herein, may be held and considered each and every of them as attached and as annexed as exhibits to this amended bill of complaint and as parts thereof.

To the end, therefore, that the defendant Walsh, Commissioner of the General Land Office of the State of Texas, may answer the allegations and matters in this amended bill of complaint contained, and that it may be adjudged and decreed by this honorable court, your orator prays:

1. That the defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, be required to set forth and discover under oath all maps, reports, and letters filed by Charles Fenton Mercer respecting the land grant and contract between the Republic of Texas and said Charles Fenton Mercer, so far as the same are of record, or have been filed or received in his office,
80 or in the archives of the State of Texas, of which he has knowledge or to which he can have access.

2. That the said defendant do further, under oath, discover and set forth all locations of lands, certificates, surveys and patents of lands which have issued or emanated from his office since the 29th day of January, 1844, for lands within the boundaries of Mercer's Colony to any colonists or persons claiming as such, or claiming by, through, or under the title and grant of Charles Fenton Mercer, or in connection with said contract, or in accordance with any law of Texas affecting or pretending to affect said colony land.

3. That the said defendant do further discover and set forth under oath all locations of land certificates, surveys and patents of lands which have issued or emanated from his office since the 29th day of January, 1844, for lands within the boundary of Mercer Colony to any person or persons not colonists of Mercer nor in privity with him, nor claiming by, through, or under the grant to Mercer, or because of any colonization, immigration or location originating therein or connected therewith, together with the names of the persons to whom issued or delivered, and the quantities of land embraced therein, and the aggregate of such lands and the date of such issues.

81 4. That the said defendant do further discover and set forth under oath the names of all persons occupying, cultivating, using, and enjoying any lands within the limits of said Mercer Colony claiming said lands under locations made by them under any laws of Texas, and whose rights and interest in and to said locations are involved in this suit, and who are prevented from obtaining and receiving titles to their said locations by reason of the injunc-

tion granted herein, together with the locations, surveys, and quantities of land embraced in each of said claims and the aggregate amount of acres of such inchoate claims to title.

5. That said defendant do further discover and set forth under oath the names of all persons and corporations to whom at any time since the service of the writ of injunction herein upon him, the said defendant, there has been issued or delivered any certificates or patents for lands within the boundaries of Mercer Colony, or to whom any evidence of either has been given, or for whom any entry, record, or memorandum of any such location, certificate, survey, or patent for land within said boundaries has since the said service of said writ of injunction been made or permitted, together with the quantity of land in each embraced and the aggregate quantity
82 of all, and the amount of fees, dues, or compensation received for the same, and the aggregate of all such.

6. That said defendant do further discover and set forth under oath as accurate an estimate as he can of the quantities of land within the boundaries of Mercer's Colony as defined by the contract and the Republic of Texas and in the map filed as an exhibit by complainant herein that is yet unlocated, uncertified, and unpatented and still open to location, certificate, survey and patent, showing the quantities of such land in each county as near as can be.

7. That the said defendant do further discover and set forth under oath a statement and estimate as nearly accurate as he can of the number of acres of all public lands open to location, certificate, survey and patent, or under his control, exclusive of those embraced within the boundaries of colonial contracts.

8. That the said defendant do further set forth and discover under oath the amount of money received from or on account of any and all sales, locations, certificates, surveys, and patents of lands within the boundaries of Mercer's Colony since the 29th January, 1844, and also in such cases where patents or certificates for land within
83 said boundaries have issued without money payment therefor, for what consideration the same were issued, or on what pretext and by what authority of law, if any.

And your orator prays that the ordinances attached to the constitution of the State of Texas adopted the 27th August, 1845, and all legislation in pursuance thereof, and all pretended legal proceedings instituted under their pretended authority, in so far as the same or any or either of the same may infringe, violate, disregard, impair, alter, change, destroy or obstruct the rights of Charles Fenton Mercer, or his associates, or his assigns, or your orator, or the Texas Association in and to the land grant or land reservation, or the exclusive rights of your orator and the Texas Association in and to the lands within the boundaries of said colony grant, or rights to receive and locate certificates on said lands and to receive legal patents for

the same, be adjudged and decreed by this honorable court to be contrary to the provisions of article 1, section 10, of the constitution of the United States, and to be null and void.

And further your orator prays that a writ of injunction may issue out of and under the seal of this honorable court directed to the said defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and to all his successors in said office, and to all the clerks, draftsmen, subordinates, agents and employees of him, the said defendant, and of his successors in office, or subordinate to or under the direction, supervision or control of the said de-
84 fendant, or of his successor or successors in office, enjoining and restraining the defendant Walsh, and each and all his successors in office as Commissioners of the General Land Office of the State of Texas, and all and every their clerks, draftsmen, subordinates, agents, servants and employees subordinate to him or them or either of them, or under the direction, supervision or control of him or them or either of them, from doing or causing or permitting to be done any act or thing whereby there may issue any patent, certificate, plat, grant, survey or location of any lands within and of the public domain of the State of Texas beyond and outside the limits of the colonial grant to Mercer, as set forth in the original bill of complaint and the exhibits therewith, to any person, persons or corporations except to the complainant, your orator, William Preston, and from diminishing or impairing the trust lands secured to the payment and discharge of the debts and liabilities of the Republic of Texas by any sale, grant, location, certificate, survey or patent, until the claim of your orator and the Texas Association shall first have been fully heard, settled and satisfied by the preparation and signature and sealing and delivering to your orator of the full, just number and amounts of land certificates to which he is entitled as hereinbefore shown, and that such injunction be made perpetual on the final hearing of this cause.

And further your orator prays that the temporary injunctions hereinbefore on the day of April, 1879, granted and issued and served upon defendant Walsh, be on final hearing made perpetual.

85 And further your orator prays that on the hearing of this cause the defendant W. C. Walsh, Commissioner of the Land Office of the State of Texas, and each and every his successors in office, be directed, ordered, and compelled by the decree and judgment of this honorable court, and by appropriate writ of mandatory injunction, to refrain and desist from longer withholding from your orator the certificates for location of land to which your orator is legally and equitably entitled under the contract between Charles Fenton Mercer and the Republic of Texas of date January 29, 1844, and from further refusing to execute and deliver to your orator the certificates for land to which on final hearing it may be decreed that your orator is entitled. And your orator prays that if it be ascertained on final hearing, from the discovery and disclosures of def't and the proof herein, that the residuum of lands within the bound-

aries of Mercer's Colony, remaining free from occupancy or claims of persons not in privity with the grant to Mercer, are insufficient to satisfy to your orator his just and equitable claim herein, then that your orator shall by appropriate decree receive certificates from the def't, the Commissioner of the General Land Office of the State of Texas, for lands of equal value to those to which your orator is entitled, by way of recompense for the lands wrongfully aliened or patented by mistake within the boundaries of Mercer's Colony. And your orator repeats each and all the averments of the original bill of complaint and of the bill of revivor, and of the bill of revivor and supplement herein, and prays as therein and in each of them
86 is prayed, and prays that he may have such other and further relief in the premises as to this honorable court shall seem meet and agreeable to equity and good conscience. May it please your honors, the premises considered, to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the def't, Wm. C. Walsh, Commissioner of the General Land Office of the State of Texas, and to all his successors in said office, and to all clerks, draftsmen, subordinates, agents, and employés of him, the said def't, and his successors in office, or subordinate to or under the direction, supervision, or control of the said defendant or of his successor or successors in office, enjoining and restraining the defendant, W. C. Walsh, and all his successors in office, as Commissioner of the General Land Office of the State of Texas, and all and every their clerks, draftsmen, subordinates, agents, servants, and employés subordinate to him or them, or either of them, or under the direction, supervision, or control of him, or their, or either of them, from doing or causing to be done, or permitting to be done, any act or thing whereby there may issue any patent, certificate, plot, grant, survey, or location of lands within and of the public domain, outside of and beyond the limits of the colonial grant to Mercer, as defined and set forth in the original bill of complaint herein and exhibits therewith filed, and as set forth in the contract made on the 29th January, 1844, by and between the Republic of Texas, by Sam Houston, President thereof, and Charles Fenton Mercer, filed therein, whereof the original is on file
87 in the office of the Secretary of State of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas, save only to your orator, and from further violating the trust attaching to the public lands of the State of Texas, under and by virtue of the article of annexation and the acts of Congress ratifying the same, and that said injunction be on hearing made perpetual.

And further that a writ of subpœna shall issue likewise from this court under its seal directed to the marshal of the western district of Texas commanding the said defendant, Wm. C. Walsh, Commissioner of the General Land Office of the State of Texas, on a certain day therein to be named, and under a penalty therein to be specified, to appear before this honorable court and then and there to

answer the premises and make discovery as hereinbefore prayed to each and every allegation hereof, and to stand to, abide by, and perform such order and decree herein as shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray.

JOHN MASON BROWN,
Counsel for Complainant.

HANCOCK, WEST & NORTH,
Solicitors for Complainant.

W. PRESTON, *pro se.*

Wm. Preston says he is a resident and citizen of the city of Lexington, in the county of Fayette, and of the State of Kentucky, he being the complainant named in the foregoing amended bill.
88 He says the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those he believes the same to be true.

W. PRESTON.

UNITED STATES OF AMERICA,
6th Circuit and District of Kentucky,
at Lexington, Kentucky.

I, George Stoll, a Commissioner of the Circuit Court of the United States in and for the 6th Circuit and District of Kentucky, at Lexington, in the State of Kentucky, do certify that on this 15th day of July, 1879, personally appeared before me, in my office in Lexington, Kentucky, William Preston, to me personally well known, who signed the foregoing amended bill of complaint in my presence, and being by me first duly sworn, did make oath that the statements therein contained are true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes the same to be true.

Witness my hand and seal as Commissioner as aforesaid, at Lexington, Kentucky, this 15th July, 1879.

GEORGE STOLL,
U. S. Commissioner.

89 *The Answer of Defendant Walsh to Complainant's Amended Bill.*

And afterwards, to wit, the 2nd day of February, 1880, the defendant Walsh filed his answer to complainant's amended bill, endorsed, to wit: "No. 98. U. S. Circuit Court. Preston *v.* Walsh. In equity. Answer of def't to amended bill filed Dec'r 24, 1879. Filed February 2d, 1880. M. Hopkins, clerk U. S. C. C."

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.

William Preston
No. 98. *v.* } In equity.
William C. Walsh.

The answer of William C. Walsh, defendant, to the amended bill of complaint filed herein on the 24th day of December, 1879, by William Preston, in whose name and behalf this suit, originally instituted by George Hancock against J. J. Groos, has been revived.

This defendant, now and all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto,
90 or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, saith that it is not true, as in that behalf stated in said amended bill and in the original bill, the averments of which are reaffirmed by complainant in said amended bill, that Charles Fenton Mercer, the Texas Association, George Hancock, the complainant William Preston, and those claiming under and to be entitled to the benefits of the contract entered into between Sam Houston, President of the Republic of Texas, of the first part, and Charles Fenton Mercer, and such associates as he should choose, of the second part, at Washington, in said Republic, on the 29th day of January, 1844, have fully performed every and all of the terms, stipulations, and conditions of said contract on their part to be performed.

That it was expressly provided in said contract that said Mercer and his associates should introduce and settle within the limits and boundaries in said contract mentioned [or such other limits as might be prescribed by the President of said Republic,] and in accordance with the provisions of an act passed by the Congress of said Republic, entitled "An act granting land to emigrants," approved February 4, 1841, and of a joint resolution adopted by said Congress to modify the provisions of said act, approved January 16, 1843, within the term of five years from the date of said contract, as many emigrant families as the said Mercer and his associates could
91 settle at the rate of one family for every section of one mile square of vacant and unappropriated land, and that number of such families to be settled as aforesaid by the said Mercer and his associates in each of the five years succeeding the date of said contract should not be less than one hundred in each and every year of the said term.

That it was further expressly provided in said contract that unless the said Mercer, his associates or their legal representatives, should, prior to the first day of May, 1845, have introduced and settled on the lands mentioned in said contract, and according to the tenor and

effect of said contract, one hundred families, that all right and title of the said Mercer, his associates and their legal representatives, should cease and determine from the moment of such default, but that such default should not operate retrospectively, but leave the said Mercer and his associates, and all persons claiming under them, whatever right, title, or interest they might have acquired prior to such default, to the same extent as if no such default or failure had occurred; and that in like manner and under the like qualifications the right of the said Mercer and his associates to proceed further under said contract should cease and determine unless two hundred and fifty families were settled on said lands in manner aforesaid before the expiration of two years from the date of said contract, and unless one hundred and fifty additional families were settled within and for each of the remaining years of said term; and that
92 the right of the said Mercer and his associates to proceed through the full term of five years from the date of said contract should, on the occurrence of any default as aforesaid, utterly cease and determine; provided, as before expressed, no such default should operate otherwise than prospectively, either in relation to the said Mercer and his associates or emigrant families actually settled, or any person or persons claiming by, through, or under them, or any of them.

And this defendant, upon information obtained from the political and judicial records and documents of the Republic and State of Texas, and especially from information, which he believes to be true, obtained from some of the old settlers of said Republic and State still surviving, and who were in a position to become acquainted with the facts, denies that either the said Mercer, his associates, his or their heirs, executors, administrators, assigns, or any of them, ever performed the aforesaid conditions and stipulations touching the introduction and settlement of emigrant families on said lands so as to be entitled to any of the rights and benefits of said contract. On the contrary, this defendant avers that they failed so to do, and that said contract, by its terms, on account of said default, ceased and determined on the 1st day of May, 1845. And upon information which he believes to be true, obtained from old settlers residing within the limits of said colony who are acquainted with the facts, he avers that the paper purporting to be a list of emigrants' families introduced and settled on said lands prior to May 1, 1845,
93 a copy of which, marked Exhibit "B," is filed with the original bill, is false and fraudulent, and was obtained and manufactured through and by fraud and misrepresentation on the part of said Mercer and his associates, and that neither the said Mercer, his associates, the Texas Association, or any one in behalf of any or either of them, or their representatives or assigns, ever introduced or settled as many as one hundred families on said lands. And upon information which he believes to be true, derived from sworn statements made by John M. Crockett, Esq., who was appointed and discharged the duties of Commissioner under an act of the Legislature

of the State of Texas "entitled an act for the relief of the citizens of Mercer Colony," approved February 2, 1850, and others, he avers the fact to be that only about a dozen of the one hundred and nineteen persons whose names are found upon said list or Exhibit "B," appeared before said J. M. Crockett and claimed certificates as settlers.

That some of the persons whose names appear upon said list never resided in said colony, and were never heard of by or known to old settlers living in the colony whose acquaintance at that early day embraced nearly all persons within its limits, and others whose names appear thereon had settled before said contract was made, and lived upon titled land, and never claimed or received any land as settlers or emigrants of said colony. That nearly, if not all, the persons living in said colony went there voluntarily and of their own accord, and at their own expense, built their own houses and established their own homes and furnished their own arms and
94 ammunition for defense, without any solicitation, inducement, aid, or assistance whatever from said Mercer or his associates, or any one for them or in their behalf, and wholly independent of and without reference to, and in some instances without even any knowledge of, the existence of such a contract; and that in truth and in fact said Mercer and associates, if they ever made any serious efforts in that direction, accomplished little or nothing in the of introducing and settling emigrants under said contract, and it has always been generally so understood throughout the country. And this defendant, answering further, saith that by the provisions of said contract of January 29, 1844, the said Mercer and his associates, or their legal representatives, were bound to have the unappropriated lands within the prescribed limits surveyed as needed for the purposes of settlement into sections of 640 acres, or half sections of 320 acres, so far as the same might be practicable; and where, by reason of the intervention of large streams of water or navigable rivers, this should be impracticable or be rendered so by prior surveys, fractional sections of greater or less dimensions than one-half might be made, and the quantity of land therein estimated and carried to the account in all respects as the entire sections by computing fractional sections in quantities of 640 acres, and subjecting them, as far as practicable, as were therein prescribed in relation to the entire sections or half sections of 640 and 320 acres; and were further required to have correct plats and copies of the field-notes of all such surveys made,
95 denoting therein the ranges and number of the sections or half sections and the fractional sections exceeding or falling short of one half section, and to return the same, or a correct copy thereof, to the General Land Office of said Republic. That by a joint resolution adopted by the Congress of said Republic, "entitled joint resolution to establish the limits of the Mercer Colony," approved February 3, 1845, the said Mercer and his associates were required to have the lines of their colony land actually surveyed and marked by the 1st day of April, 1845, and it was therein expressly declared that

a failure to comply with this requirement should work a forfeiture of said contract. And this defendant denies that the said Mercer or his associates, or their legal representatives or assigns, or any or either of them, or any one for or in behalf of any or either of them, ever at any time complied with the requirements of said contract, or of said resolution touching the survey and sectionizing of said lands, the making and filing of plats and field-notes and the surveying and marking of the lines of said colony, basing his denial upon information, which he believes to be true, derived from the public records and documents belonging to the political and judicial departments of the government of said Republic and State, and upon sworn statements made by old settlers living upon or in the vicinity of said colony and familiar with its history. That after examination he has been able to
96 find no evidence in the General Land Office of said State, where the same should properly be found, showing that any of such surveys were ever made; and as to the certified copy of maps of date May 1, 1845, referred to in the original bill and filed therewith as Exhibit E, this defendant, from an inspection of the same, believes it to be antedated and that it was surreptitiously placed on deposit in the office of the Secretary of the State. That said pretended map has all the appearance of being of recent manufacture, and the paper upon which the same is made looks fresh and new, and presents no indication whatever of age; and this defendant believes that said pretended map was manufactured just before the filing of the original bill, and surreptitiously and without the knowledge of the Secretary of State deposited in his office, there being no file or other mark upon said paper to indicate the time when said paper was deposited in said office.

That said map was not made in accordance with said contract or said joint resolutions, and the said limits of said colony as designated in said contract are not the same as those indicated on said map, but are materially different, in this: said contract fixes the southern boundary of said colony at a point on the Trinity River opposite to a creek known as "Cedar Creek," crossing said river at the lower bank of Cedar Creek, running thence to the mouth of Aquilla Creek on the Brazos River; whereas the southern boundary line of said
97 colony on said map does not extend from the lower bank of said Cedar Creek on the Trinity River to the Aquilla Creek on the Brazos River, but commences at a small spring branch on Trinity River, which branch was never known as "Cedar Creek," and was not the "Cedar Creek" mentioned and designated in said contract, and which said branch is about eighty miles below and south of said Cedar Creek mentioned and designated in said contract, and thence from said branch to the Aquilla Creek on the Brazos River, thus including in said pretended survey and lines never actually and in fact run and marked upon the ground, a region of country in a triangular shape containing some 3,000 square miles, more than the land designated for said colony by said contract. And this de-

fendant, answering further, saith that by the provisions of said contract of January 29, 1844, the said Mercer and his associates or their legal representatives or assigns were bound and required to cause to be built within the limits of said colony, from time to time, as needed, such number of log cabins or small houses constructed of other materials as circumstances should demand for the comfortable residence of each family introduced and settled under said contract; and were further required to cause each male emigrant of the age of 17 years and upwards to be supplied and bring with him a good rifle, yager, or musket, and a sufficient supply of ammunition; and were further required to keep on hands at all times in some convenient place of deposit such quantity of prime ammunition as would supply to each male emigrant of the age of 17 years and upwards,
98 settled by them, not less than 100 rounds; and were further required to obtain act of incorporation from the Republic of Texas, and within six months from the date of said contract, and once within every six months thereafter until such act of incorporation was obtained, to transmit a list of their copartners and a statement of the share or shares of each in the stock or property of the association or company, and of the company name or title assumed by them or a majority of them in interest, to the Department of State, or other proper department of said Republic. And this defendant upon information and belief avers that none of the conditions and requirements aforesaid, touching the building of homes or cabins, furnishing and keeping arms and ammunition, obtaining an act of incorporation, or making reports of the stock, property, &c., of the association, all of which were material inducements and considerations to the making of said contract, were ever performed in whole or in part by said Mercer, the said Texas Association, or by any one for or in their behalf, or claiming by, under, or through them, but in all these respects they made default, and thereby lost, if any they ever had, all right, title, claim, and interest under said contract.

This defendant, answering further, saith that not only has said contract never been performed so as to entitle the said Mercer and his associates, or any one for or in their behalf, to claim any rights or benefits thereunder, but the same was made against and in
99 contempt of the will of the people of the Republic of Texas as expressed through their Senators and Representatives in Congress, and under circumstances which justified them, as was done, in stigmatizing it as fraudulent. That upon the meeting of the 8th Congress at Washington in said Republic on the 4th day of December, 1843, so general and great was the dissatisfaction and disappointment of the people with the operations of the act of January 4, 1841, entitled "An act granting land to emigrants," and the act amendatory thereof, approved February 5th, 1842, and so convinced had they become of the impolicy of such laws and of the wide opening afforded by them for executive favoritism, dangerous monopolies, and the easy perpetration of frauds, that their repeal with singular

unanimity was speedily sought. At an early day in the session, as disclosed by the journals, bills were introduced in both houses for this purpose; the bill hereinafter mentioned, and which, with some amendments, afterwards became a law, being introduced into the Senate by Mr. Kauffman, a distinguished citizen and Senator of the Republic, on the 19th of Dec'r, 1843. Said act, entitled "An act to repeal all laws now in force authorizing the President to form colonization contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with," was passed
100 by the Senate on the 28th day of Dec'r, 1843, and by the House on the 2nd day of Jan'y, 1844, and was sent to Sam Houston, President of said Republic, afterwards a party to said contract, for approval. It was vetoed by him and returned to the Senate, in which it originated, who passed it over his veto on the 25th day of Jan'y, 1844, by a vote of nine yeas to three nays, and transmitted it to the House, who also, on the 30th day of January, 1844, passed it over his veto by a vote of 35 yeas to 3 noes, the act thus becoming a law by a constitutional majority. That this strong feeling of the people against the making of any more such contracts, and their determination to repeal all laws authorizing them, so promptly and emphatically expressed through the action of their representatives, was, as this defendant believes, not only, as it necessarily must have been, well known officially and personally to President Houston, but was well known to the said Mercer, who was in Washington at the time, and signed said contract only the day before the said law would go into effect, and just in time to escape the consequences of its evident passage over the President's veto. That said last-mentioned act not only repealed all previous laws authorizing the President to make colony contracts, and inhibited the making of such contracts in future, but declared that all colony contracts theretofore entered into, the conditions of which had not been strictly and rigidly complied with, or should thereafter fail to be complied with, should be forfeited, and that no extension of time or privilege should be granted to said contractors for the purpose of carrying such contracts into effect. That the earnest opposition to such contracts continued to the meeting of the convention of 1845, called for the purpose of framing a constitution, preparatory to the annexation of said Republic to the Union as one of the States thereof. That, as will be seen by the published debates of said convention, in relation to the ordinance of August 27, 1845, to which ordinance more particular reference will hereinafter be made, said contract was then
101 denounced as unconstitutional and a fraud upon the people of the Republic, and the circumstances under which it was made, after said Mercer, who was at Washington when the act of January 30, 1844, became a law, and was fully aware of the will of the people to prevent the making of any more such contracts, was freely and harshly criticised. Distinguished delegates in said convention stated upon the floor thereof that said Mercer went before the Congress of the Republic, by which said act of January 30, 1844, repealing all

laws authorizing colony contracts was passed, for the ostensible purpose of being granted the privilege of appearing before Congress and advocating the measure of getting an extension of the time on the Peters Colony contracts, in which he was interested, and without communicating the fact to any member of that Congress that he desired a new contract, had the contract in his pocket at the time for the fairest portion of the upper Trinity. In the ordinance hereinbefore referred to, adopted by said convention August 27, 1845, it was declared in the preamble thereto that the various contracts which had been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas, were believed to be unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upwards of seven millions of acres of the public domain of Texas in the hands of a few individuals, when in truth the citizens, soldiers, and creditors of the Republic of Texas had by the laws and constitution of said Republic a clear and indisputable previously-subsisting right to locate upon the domain thus attempted to be assigned to said contractors. And it was by the said ordinance ordained and provided "that it should be the duty of the Attorney-General of said State, or the district attorney of the district in which any portion of the colonies might be situate, as soon as the organization of the State should be complete, to institute legal proceedings against all colony contractors who had entered into contracts with the President of Texas; and if upon such investigations it should be found that any such contract was
102 unconstitutional, illegal, or fraudulent, or that the conditions of the same had not been complied with, according to its terms, such contract should be adjudged and decreed null and void; provided, however, that all actual settlers under any such contract should be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And that in all suits brought by or against any contractors, or any person claiming under, by or through them, or either of them, it should be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead; and the party might introduce testimony to prove the claim or title to have been forfeited as well as for frauds, or illegality, or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas should be deemed good and valid in law, in all such suit or suits in said State. It was by the said ordinance further provided that the Legislature of said State should be restrained from extending any contracts for settling a colony and from relieving any contractor from the failure of the conditions or the forfeiture accruing from non-compliance with the contract, and that said ordinance should be presented to the people for their adoption or rejection at the same time the constitution made by said convention should be presented to them, and that the returns of the vote taken on said

ordinance should be made to the office of the Secretary of State of the Republic of Texas at the same time the votes for the constitution were returned. That said ordinance was adopted by a vote of the people of said Republic, and thereby became a part of the fundamental law of the land and the organization of the State under the constitution made by said convention, completed February 16, 1846. That in obedience to and in conformity with the provisions of said ordinance, J. W. Harris, Esq., the Attorney-General of the State of Texas, within a short time after it took effect, to wit, on the 11th day of October, 1846, filed in the District Court of Navarro county,
103 in said State, "a suit in the name of A. C. Horton, Governor of said State, for and in behalf of said State, as plaintiff, against Charles Fenton Mercer and his associates as defendants, the said county of Navarro being situated within the limits of the said pretended Mercer Colony. That it was alleged in the petition in said suit, among other things, that the said Mercer and his associates, and his and their representatives, failed to introduce and settle one hundred families on lands in said contract described (and agreed to be set apart), according to the tenor thereof, prior to the first day of May, 1845, and also failed to introduce and settle on the lands in said contract described (and agreed to be set apart) two hundred and fifty families on or before the expiration of two years from the date of said contract, according to the tenor thereof, and also that said contract was illegal, and made in violation of the constitution of the Republic of Texas, and was therefore null and void from the beginning. That said petition, among other things, prayed that the said contract might be decreed to be invalid, and null and void from the beginning. That in an amended petition filed in said suit by said J. W. Harris, Attorney-General, it was further alleged, among other things, that the said Mercer and his associates did not survey, designate, and mark the boundary of the territory thus set apart for them for purposes of colonization, by the terms of the contract aforesaid, as by law and the spirit of said contract they were bound to do. That the terms of said contract fix the southern boundary of said territory so set apart as aforesaid at a point on the River Trinity opposite Cedar Creek, crossing said River Trinity at the lower bank of Cedar Creek, running thence to the mouth of the Aquilla on the River Brazos; that said Mercer and associates had run a line from the Trinity River to the Brazos, but not in accordance with the calls of the contract; that said line did not extend from the lower bank of Cedar Creek on the River Trinity to the Aquilla on the River Brazos, as by the terms of said contract it should, but said southern line, commencing at a small spring branch on the River Trinity, never known as Cedar Creek, some eighty miles below the Cedar Creek specified in the contract as the call on the Trinity River from which a line should extend to the mouth of the Aquilla on the River Brazos, including thereby a region of country, in a triangular shape, containing
104 some three thousand square miles, more than by the terms of the contract they were entitled to. Also that the said Charles

Fenton Mercer and his associates had violated all and singular the agreements and covenants contained in the said contract of colonization.

Defendant further alleges that the said Charles Fenton Mercer and his associates, the defendants in said suit, were duly and legally cited to appear and answer the petition in said suit, in accordance with the laws of Texas, and that thereafter, to wit, at the September term of the District Court in and for said Navarro county, A. D. 1848, to wit, on the 25th day of September, 1848, the said suit of A. C. Horton, Governor, *vs.* Charles Fenton Mercer and his associates was heard in the District Court of Navarro county aforesaid, and upon a full hearing thereof by and before said court, among other things upon the verdict of a jury therein duly rendered that the contract of colonization made and entered into between Sam Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the 29th day of January, 1844, be and the same is hereby adjudged and decreed null and void.

Defendant further alleges that the aforesaid judgment and decree of said court still remains in full force and effect, and in no wise reversed, satisfied or made void, all of which will more fully appear by the record and proceeding in the aforesaid suit in Navarro county.

Defendant further alleges that the said colonization contract described in the original bill of complaint in the cause, and filed therewith as exhibit "A," and upon which the said plaintiffs' said bill
105 of complaint is based, is the identical same contract set forth and described in the said suit in the District Court of Navarro county wherein A. C. Horton, Governor of Texas, was the plaintiff and Charles Fenton Mercer and his associates were the defendants, and that the same identical contract which by the judgment and decree of said District Court of Navarro county, rendered and entered in said suit as aforesaid, was adjudged and decreed to be null and void.

Defendant further alleges that under and by virtue of the constitution and laws of the State of Texas, the said District Court of Navarro county was a court of competent and ample jurisdiction to hear and determine the aforesaid suit of A. C. Horton, Governor, *vs.* Charles Fenton Mercer and his associates, and render and enter therein the aforesaid judgment and decree which it did render and enter therein as aforesaid.

Defendant further alleges that the same identical subject-matter involved in said suit in said District Court is involved in this cause, and that the parties in interest are in privity identically the same. That the said proceedings were in all respects fair, the said Mercer and associates being represented, as the defendant is informed and believes, by two of the most distinguished lawyers in the State, to wit, by George W. Paschal and William G. Hale, Esqs.

And this defendant insists that the matters and things set up in

complainant's original bill of revivor, and supplement and
106 amended bill, are *res adjudicata* and barred by the said judgment of the District Court of Navarro county, and he claims the same benefit of this defense as he had availed himself thereof by plea in bar.

And this defendant, answering further, says that a certified copy made December 11, 1848, of the proceedings in said court in said cause, and of the said judgment and decree shortly after its rendition by the said District Court of Navarro county, were deposited in the General Land Office of the State of Texas, for the observance of said Land Office, and that the same has remained on deposit in that office to the present time, and is now on deposit there, and that the said judgment and decree of said court has been recognized by each and all of this defendant's predecessors in office of Commissioner of the General Land Office, as valid, legal, binding and final, and has been so recognized by this defendant, and he believes by all other departments and officers of the government, and he still so regards it, and has never at any time heard the validity, legality and conclusiveness of the said judgment or decree doubted or called in question, until the institution of this suit, and that the time by law allowed for the filing of a bill of revivor, taking an appeal, prosecuting error, or otherwise reversing or bringing in question said judgment or decree, expired, as this is advised, more than a quarter of a century ago. That the said judgment and decree was mentioned and expressly recognized in an act of the Legislature of Texas, entitled "An act
for the relief of the settler in the territory commonly known
107 as Mercer Colony," approved January 24, 1852; and in said act it was expressly declared that nothing therein contained should be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract, or rights growing out of the same. That the act of August 12, 1870, entitled an "Act to regulate the disposal of the public lands of the States of Texas," referred to in the amended bill as recognizing the trust and liability of the State of Texas under said contract, does not, as this defendant is advised, either in express terms or by implication, recognize any such trust or liability. That whilst said contract & a section of country commonly called Mercer's Colony have, since the adoption of said ordinance of August 27, 1845, been referred to in the legislation of said State as facts, no law, as this defendant is advised, has ever been passed recognizing or affirming the validity of said contract, or conceding that said Mercer and associates ever acquired any rights thereunder, or had any claim, legal, equitable, or otherwise, against said State on account thereof. That the primary object of all legislation having reference to said colony was the benefit not of the contractors, but of the citizens, who, without regard to said colony contract, had at their own expense, and without inducement or aid from said Mercer and associates, settled and established homes on the land themselves. That such, as this

defendant is advised, was the object of the act of February
108 2, 1850, entitled "An act for the relief of the citizens of Mercer Colony," for it is therein expressly declared that nothing in said act contained shall be construed so as to place the contractors in a better condition in regard to the State of Texas than they would be if said law had not been passed. That the various acts amendatory of and supplementary to the said last named act of February 2, 1850, had for their object the relief of the citizens living within the limits of what was commonly known as Mercer's Colony, by affording such as were bona-fide settlers the means of making proof and obtaining certificates to their lands without regard to whether or not they had acquired rights under and in accordance with the provisions of said contract, the proof being variant from and less than that required by the contract itself, and that the lands thus received by the citizens of said colony were received as full donations from the State of Texas, and not by virtue of the performance of conditions on their part as colonists under said contract.

And in this connection this defendant denies that the families whose names appear in Exhibit "D," filed with the original bill in this suit, were, as averred in said original bill, and which averments are reaffirmed in said amended bill, introduced and settled by said Mercer and associates within the limits of said colony, according to the terms of said contract. On the contrary, this defendant saith that the persons named in said Exhibit "D" received certificates for
109 land issued by John M. Crockett, Esq., Commissioner, &c., under the act of February 2, 1850, entitled an "Act for the relief of Mercer Colony," to which act reference has heretofore been made, and that such certificates were issued as hereinbefore stated without regard to the performance of the conditions of said contract by the contractors or colonists, and wholly independent of any services rendered by either; and this defendant insists that the issuance of such certificates can in no way enure to the benefit of said Mercer and associates as an acknowledgment of the validity of said contract or the performance of its conditions, or as an estoppel or otherwise against the State of Texas; for, as before stated, said act under which said certificates were issued expressly provided that nothing therein contained shall be so construed as to place the contractors of said colony in a better condition in regard to the State of Texas than they would have been if said act had not been passed. That when said act of February 2, 1850, was passed neither the contractors or any colonist had any legal right or claim under said contract, and if they ever had they had long before that time become extinct.

And this defendant, answering further, saith that the Republic of Texas never granted to the said Mercer and associates, or any one claiming through them by virtue and force of the terms of said contract, any right or title to the lands within the limits designated in said contract, or ever put them in possession or authorized them to take possession of said lands, and that said Mercer and associates

never in fact took or pretended to take or hold possession of
110 said lands under the said contract. That no right, claim, or title was vested or conferred by said contract to the whole or to any particular part of the lands within said limits or attached to the land itself. That by said contract the Republic of Texas was to convey to said Mercer and associates a section of 640 acres, or two half sections of 320 acres of land for each family that said Mercer and associates should introduce and settle within the limits mentioned in said contract, to be conveyed by said Republic only when the said Mercer and associates should exhibit to the Commissioner of the General Land Office of said Republic or other proper officer the evidence of having surveyed the portion of the land for which such conveyance was desired, and the further evidence that comfortable small houses or cabins had been erected thereon and families residing therein who had been settled thereon by said Mercer and associates or their legal representatives; and upon the further condition that said Mercer and associates should pay the expenses of such conveyance as provided by the said act of February (January) 4, 1841. That out of each of the sections to be conveyed as aforesaid, upon the conditions aforesaid, said Mercer and associates by said contract bound themselves as soon as they should receive title from the said Republic to any of such tracts of land to convey to each and every family such number of acres as should be agreed upon between said Mercer and associates and such family, not less than 160 acres nor more than 640 acres to any one family, and to include in the
111 deed to each family a clause of defeasance requiring each family to enclose with a good fence and cultivate at least fifteen acres of the land so conveyed and reside upon the same for three (3) years or forfeit their title to the Republic; or if the said Mercer and associates should name the number of acres stipulated to be given to each family as aforesaid, and request the deed of conveyance therefor to be made to the several families respectively, or their legal representatives, directly from the government of said Republic, in that case the deed should be so made; that in this manner only, and by the performance of the conditions aforesaid, with respect to each and all of which the said Mercer and associates have made default, could the said Mercer and associates acquire even an equitable claim to any particular part or portion of the land in the extensive territory and limits designated in said contract, or call upon said Republic or State to make any conveyance thereof to them; that by said contract said Mercer and associates were, in addition to the rights to acquired by and through the settlement of emigrant families as aforesaid, to receive from said Republic, as a further compensation for their services and recompense for their labor and expenses in introducing and settling said families, a premium of ten sections of 640 or twenty sections of 320 acres of land for each and every hundred families introduced and settled as aforesaid; and upon adducing clear evidence that they had settled one hundred families as aforesaid,
112 said Mercer and associates were to select premium sections within the limits designated in said contract and from the

alternate sections, which by the terms of said contract they were required to have surveyed and reserved to the Republic, to which said Republic was to make them title; that no such surveys or selections entitling them to such premium land were ever made by said Mercer or associates, nor were they ever entitled thereto, because of the non-performance by them of the conditions of said contract; and the lands lying within the boundaries designated in said contract, by virtue of the express stipulations and conditions of said contract, which were not located by emigrant families aforesaid, or appropriated under the provisions of said contract, reverted to said Republic within five years from the date of said contract. And this defendant avers that during the said period of five years neither said lands nor any part thereof were so located or appropriated, and that at the expiration of said period, if not before, to wit, on the twenty-ninth day of January, A. D. 1849, said lands reverted to the State of Texas, which succeeded to all the rights of said Republic.

And this defendant, further answering, saith that the privilege on the part of said Mercer and associates to settle emigrants and obtain the premium sections was, by the terms of said contract, expressly restricted to the vacant and unappropriated public lands within the limits of said contract, and did not, and was not intended to, extend to land previously located or appropriated. That before
113 the making of said contract said Republic, under and in pursuance of an act of Congress of said Republic, entitled "An act appropriating certain lands for the establishment of a general system of education," approved January 26, 1840, for a university to be thereafter established, about 41,217 acres of said land within the limits afterwards designated in said contract; that this appropriation of said land for the purpose aforesaid has always been respected and protectod by the laws of said State as a sacred and inviolable trust; that in the constitution of said State said lands and the proceeds thereof are declared to be a part of the permanent university fund of said State. That, as authorized by law, said State has, from time to time, sold portions of said land to actual settlers, who have erected improvements, established homes, and opened farms thereon, and are now, and were at the time of the institution of this suit, in actual possession thereof, using, cultivating, and enjoying the same; that a considerable number of such settlers have not as yet obtained patents for their lands, their notes for deferred payments being held by said State; that an annual installment of principal and interest on many of these outstanding purchase-money notes fall due March 1, 1880, and under the laws of said State a failure to pay such installments subjects the purchaser to a forfeiture of all rights and interests in the land purchased, and under the constitution of said State the Legislature thereof is expressly
114 inhibited from granting any relief in such cases. That said purchasers have been greatly vexed and injured by the issuance of the injunction of April 21, 1879, by this honorable court, no reservation or exception being therein made as to said university

lands, and the land department, of which this defendant is at the head, given much trouble and embarrassment in relation thereto. That this defendant is advised that the title of said State to said lands, or the right of said State to dispose thereof, has never been questioned, except in a matter of conflict with an old Mexican grant; and he insists that if it is the purpose of complaint to ask any relief against any such settlers, or whether or not he purposes to ask relief, that in view of said injunction, which materially and injuriously affects their interests, all such settlers are necessary parties, and that said bill is defective on account of complainant's failure to make them such. That no injunction bond was required or has been given by complainant; who is a non-resident; and for the injury and wrong which is being done said settlers, said State, and others by said injunction, no protection is afforded.

And this defendant, answering further, saith that he denies that said contract with said Mercer was a liability of the Republic of Texas, for the discharge of which an express trust was created by the articles of annexation of March 1, 1845, on the lands within the limits mentioned in said contract, as well as on the entire pub-
115 lic domain of the Republic and State of Texas, as in that behalf is alleged in said amended bill. That said contract was made in anticipation of rights to be thereafter acquired by means of compliance with the terms and conditions of said contract, of all which were important and material conditions precedent, and by means of a compliance with the laws under which said contract was made. The only rights under said contract were those in expectancy, said Mercer and associates having no other rights except the right to perform and fulfill the requirements thereof. That the enjoyment of the anticipated benefits and the acquiring of titles to land depended entirely upon the performance of the several conditions of said contract. That, as hereinbefore stated, the said Mercer and associates never performed the conditions of said contract so as to acquire any rights thereunder, or create or fix any liability against the Republic or State of Texas; and that no such liability in fact existed at the time of the acceptance of said articles of annexation, said Mercer and associates before that time having forfeited all rights, if any they ever had, under said contract. But if the said Mercer and associates had any rights whatever under said contract when said articles of annexation were accepted, they were not, as this defendant is advised, of such a character as to be, within the true intent and meaning of said articles, a liability of the Republic of Texas, but were a mere inchoate equity, an imperfect title, originating under a former government, to wit, the Republic of Texas, cognizable, if at all, only by the political authority, and not capable of being enforced by any action of the judicial tribunals of the country; and, as hereinbefore stated, neither the political authority of said State or Republic have ever recognized or legislated in reference
116 thereto, so as to give it any standing in any court. That it was not, and was not intended to be, the subject-matter of a trust,

nor was any trust in relation thereto created, expressly or otherwise, by the said articles of annexation. That the lands upon which said pretended trust is alleged to have been created were the lands of the Republic of Texas, and never were the lands of the United States; and the State of Texas, by the said articles of annexation, never consented to become a trustee for the said Mercer and associates or any one else in particular, or to hold her public domain, or any part thereof, as charged with a trust cognizable by the courts of the country, but retained the public domain of said Republic for the object, as expressed in the said articles of annexation, of applying the same to the debts and liabilities of said Republic, to the end that in no event should such debts and liabilities be debts or liabilities against the Government of the United States. That the determination of what were debts and liabilities, and the manner in which they should be established, and in what way said public domain should be applied to their satisfaction, were matters wholly within the discretion of the political authority of said State. That if it be true that the State of Texas holds her public domain in trust for the benefit, in part, of said Mercer and associates, as in said bill alleged, which is denied, then this defendant insists and suggests that the complainant's bill is defective for the want of proper parties; for he says that the State of Texas, who holds the legal title to said lands, is not before the court, and that no relief can be granted herein without her presence, nor is this honorable court competent to make any decree against said State.

And defendant, answering further, saith that if any such trust ever existed he has no personal interest therein, and that the duty of its execution has never been devolved upon him officially by
117 law, or if in any respect so cast upon him, it is in matters of discretion which cannot be controlled by this honorable court. That this defendant, as Commissioner of the General Land Office of said State, is, under article 4, section 1, of the constitution of said State, an officer of the executive department thereof, and is not a mere ministerial officer as alleged in said amended bill, but is vested with full power and authority, discretion and judgment in the performance of his duties under the law as such Commissioner. That he has entered into bond and taken an oath requiring him, amongst other things, to perform the duties of said office agreeably to the constitution and laws of said State.

That this defendant is advised that there has never been, and is not now, any law of said State authorizing or directing him as Commissioner as aforesaid to issue certificates or patents to said Mercer and associates or any one claiming by, through, or under them, and to do so would, as he is advised and believes, be a breach of his official bond and violation of his official oath and of the laws of said State. That under a law of said State entitled "An act to require the governor of the State to countersign certificates to land hereafter issued from the General Land Office in certain cases," approved April 19, 1879, and by which this defendant is bound, it is provided,

amongst other things, that whenever any doubt may arise as to the propriety of the issuance of any certificate or certificates for land by the Commissioner of the General Land Office, or whenever a suit may arise in any court whatever having for its object to compel or restrain the issuance of such certificate or certificates by Commissioner, in all such cases, before any such certificate or certificates shall issue, said Commissioner shall notify the Governor of the existence of such a doubt or suit, and said Commissioner shall act in the premises as advised by the Governor. And further, that
118 when the Commissioner of the General Land Office shall have issued any certificate or certificates under the circumstances recited in section 1 of said act, such certificate or certificates shall be presented to the Governor for his approval and signature, and when the Governor has examined the same, and the circumstances under which they were issued, if he approves the issuance thereof he shall countersign the same, and if he disapproves the issuance thereof he may refuse to countersign the same, and when the governor has failed or refused to approve and countersign said certificate or certificates, no surveyor, either public or private, in this State, shall make a survey for the same, nor shall the same be recognized as a valid land certificate for any purpose whatever.

That this defendant has notified his excellency O. M. Roberts, Governor of said State, of the pendency of this suit, and has been advised by his excellency not to issue any certificates for land to the said Mercer and associates, or those claiming by, through, or under them. And that this defendant is required by said law to act in the premises as advised by his excellency, and has so acted. And in this connection this defendant denies the allegations of said amended bill in that behalf made, to the effect that his excellency Governor Roberts and this defendant conspired together, and instigated and procured the passage of said last named act for the purpose of embarrassing the complainant in the assertion of his rights and obstructing the course of justice in this case.

And this defendant, answering further, saith that he denies that he has, as in that behalf in said amended bill alleged, issued patents to lands in violation of the injunction of this honorable court, and he further denies that he has in any other manner, by the issu-
119 ance of certificates or otherwise, acted in contempt of its authority and order in the premises.

And this defendant, answering further, saith that said Mercer and his associates were required by the terms of said contract, until they should obtain a charter of incorporation, which has never been done, to appoint by a majority of their number in interest, in such mode or by such title or denomination as a majority in interest might agree, or in some instrument in writing or articles of agreement of association, and under such instrument of writing to invest such person or persons with full power, as their trustee or trustees, to receive and hold for their benefit and on their behalf, according to such rules as they or a majority in interest in their company or asso-

ciates might prescribe in writing from time to time, the titles and conveyances of such lands, bonds, obligations, notes or money as they should agree, by a majority in interest of their number, to confide to the keeping or to the use of the said trustee or trustees.

And this defendant denies that the complainant William Preston, by whom this suit is now prosecuted, has any right or interest in the subject-matter of this litigation, or that any authority, right or interest, legal or equitable, has ever been devised or granted to or conferred upon him, in accordance with the aforesaid terms and provisions of said contract, to maintain this suit or obtain any relief herein. That it appears by Exhibit "Q," filed April 12, 1879, with the supplemental bill, that there are some thirty-six shares of stock in the Texas Association owned by others than those claiming through said Mercer, two of whom are residents of the State of Texas, and all of whom are necessary and proper parties to this suit; and this defendant suggests that on account of the absence of said persons from the record, this suit is defective for the want of parties.

And this defendant, answering further, saith that he is in-
120 formed and believes that there are persons who, prior to the granting of the injunction of this honorable court, have made, under and in conformity to the laws of the State, bona-fide locations and surveys, erected improvements and established homes and opened farms, of which they are now in possession, using and cultivating the same, on lands embraced within the limits designated in said contract, and who but for said injunction would be entitled to and would receive patents to their said lands. That the interests of such persons are materially involved in this suit, and are seriously and prejudicially affected by the said injunction. And this defendant insists that all such persons, a list of whose names he will promptly furnish to complainant if he so desires, so interested in this litigation, are necessary parties to this suit, and he suggests that on account of their absence complainant's said bill is defective for the want of parties.

And this defendant, answering further, saith that if the said Mercer and associates, or any one claiming by, through or under them or any of them, or the said complainant, William Preston, ever had any right or claim of any character whatsoever under said contract, which this defendant does not admit, or were ever beneficiaries under said contract as a trust, which is also denied, all such rights, claims, and interests were not only long before the institution of this suit barred by the laws of limitations of the State of Texas, but the same are stale and barred by the lapse of time, and neither the said Mercer nor his associates, nor any one claiming by, through or under them or either of them, are entitled to any relief whatever, because of their laches; and neither the said Mercer, his associates, or any one claiming by, through or under them, or either or any of them, were, as this defendant is informed and believes, ever
121 in possession of any of said lands.

That this defendant is informed and believes, and he avers

the fact to be, that since the twenty-seventh day of August, 1845, the State of Texas and her officers have openly and notoriously, and adversely to all the world, claimed, controlled, and from time to time disposed of, vacant lands within the limits designated in said contract. That neither the said Mercer, his associates, or any one claiming by, through or under them, or either of them, ever applied to or demanded from the Commissioner of the General Land Office of Texas, as this defendant is informed and believes, for a period of thirty years from the date last aforesaid, any certificates to any lands within the limits designated in said contract, or ever asserted or pretended until the institution of this suit that they were entitled to any such certificates. That the said Land Office was open during the whole of said time for the transaction of business, and persons were constantly receiving certificates therefrom and locating the same on land within said designated limits and obtaining patents thereto, without any objection or protest from the said Mercer or his associates, or any claiming by, through or under them, or either of them; and a knowledge of these facts was easily accessible to, if not in fact brought home to, said Mercer and his associates, by, through or under them.

That if any trust ever existed in behalf of said Mercer and his associates, which is denied, the same became extinct upon the failure of said Mercer and his associates to comply with and perform the several stipulations and conditions of said contract, as hereinbefore stated; and that said pretended trust, if ever it existed, which is denied, was expressly, openly, notoriously, and continuously denied, renounced, and repudiated by the State of Texas, its departments, officers, and citizens for a period of thirty years prior to the
122 institution of this suit.

That no means, as far as this defendant is advised, informed, and believes, has ever been used by the State of Texas or any of her officers to conceal from the said Mercer or his associates, or any one claiming by, through or under them, any of the facts, matters or records pertaining to the said contract, or the acts of said State or any of her officers in relation thereto. And this defendant claims the same benefit of the said several matters of defense, by way of limitations and stale demand, as if he had availed himself thereof by a plea in bar.

And this defendant, answering further, saith that as to the discovery sought by the interrogating part of complainant's said amended bill, calling upon this defendant to set forth all maps, reports and letters filed by said Mercer, respecting the land grant between the Republic of Texas and said Mercer, which are of record, or have been filed or received in the General Land Office of Texas, and all locations of lands, certificates, surveys and patents issued since January 29, 1844, for lands within the boundaries of Mercer Colony, to colonists or persons claiming under or in connection with said contract, and all locations, certificates, surveys or patents issued since January 29, 1844, for lands within the boundary of said colony to

persons not claiming in privity with said Mercer, together with the names of the persons to whom issued, the quantity of lands embraced therein, and the aggregate of such lands, and the dates of such issues, and the names of all persons occupying, using and enjoying and cultivating, within the limits of said colony, claiming said lands under locations made under the laws of Texas, whose rights and interests are involved in this suit, and who are prevented from obtaining and receiving titles to their land by reason of the injunction
123 granted in this suit, together with the locations, surveys and quantities of land embraced in each of said claims, and the aggregate amount of acres and an estimate of the quantity of land within the boundaries as defined by the contract, and in a map exhibited by complainant, yet unlocated and unpatented and still open to location, and the quantity in each county and an estimate of the number of acres of all public lands open to location and under his control, exclusive of those embraced within the boundaries of colonial contracts, and the amount of money received from or on account of all sales, locations, certificates, surveys and patents of lands within said colony since January 29, 1841, and where the same have been issued without money, the consideration for which the same were issued, and the pretext, and by what authority of law, if any, the same were issued. He respectfully submits that the complainant is not entitled to, nor is this defendant compelled to make any further or other answer thereto than he has already done, because he says that has heretofore in this answer set up several bars to the complainant's whole bill, and claimed the same benefit thereof as if he had pleaded the same.

And as a further reason why this defendant excuses himself from answering said interrogatories, he says that he has no personal interest in this suit, and no personal knowledge peculiar to himself of the matters inquired of, most of which are ancient, having transpired a great many years ago, and long before this defendant became Commissioner of the General Land Office. That the documents, records, and papers called for are public records of the General Land Office of Texas and speak for themselves. That under the law of said State it is his duty to furnish complainant, if he apply for the same, copies thereof, upon payment of the
124 usual fees, of which fees he is by law required to make quarterly returns, verified by his oath, and which fees he is required by law to pay into the State treasury. That the complainant well knows of the existence of the law and has heretofore obtained copies of records, documents, etc., from said office, and could easily, at any time before the filing of said amended bill, have obtained copies of all desired papers. That this defendant will cheerfully, and as promptly as the clerical force at his command will enable, furnish complainant as required by said law such copies as he may wish, and afford him every proper facility for the freest and fullest examination of all matters pertaining to said contract, and the action of the State and her officers in relation thereto, as far as

disclosed by the records in said office. That this denfendant could not collate for the complainant the voluminous maps and documentary evidence which he thus attempts to obtain within the time allowed by the order of his honorable court in which to answer said amended bill. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or anything in said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

W. C. WALSH,
Commissioner General Land Office of Texas.

PEELER AND MAXEY,
WILSON & GAINES,
Solicitors for Defendant.

125 UNITED STATES OF AMERICA, }
State of Texas, Travis County. }

On this the 31st day of January, A. D. 1880, before me personally appeared William C. Walsh, and made oath that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

W. C. WALSH,
Commissioner General Land Office of Texas.

Sworn and subscribed to by me the day and year above written, at Austin, Travis County, Texas. In testimony of which I hereto sign my name and affix my official seal.

Z. T. FULMORE,
Notary Public, Travis County, Texas.

Replication of Complainant Preston.

And afterwards, to wit, the 23rd day of February, 1880, the
126 complainant Preston filed his replication, endorsed, to wit: "No. 98. Hancock *v.* Groos, Land Commissioner, etc. Replication. Filed Feb. 23, 1880. M. Hopkins, clerk."

In the Circuit Court of the United States for the Fifth Circuit and District of Western District of Texas, at Austin.

George Hancock, complainant,
v.
J. J. Groos, Land Commissioner, etc., defendant. } In Equity.

The replication of Wm. Preston, in whose name as complainant this cause has heretofore been revived, to the answer of the defendant, W. C. Walsh, herein filed at the February Rules, 1880, and which answer is erroneously entitled as of the suit of Wm. Preston *v.* W. C. Walsh, and to the original answer of said defendant.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, and of the original answer hereinbefore in this cause filed for replication, thereunto saith, that he will aver and prove his said bill and amended bill, and bill of revivor and of supplement to be true, certain, and sufficient in the law to be answered unto; and the said answer to the said defendant are and each of them
127 is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answers, or either of them contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays, as in and by his said original bill, bill of revivor and supplement, amended bill of complaint, he hath already prayed.

W. PRESTON, *pro se.*
JOHN MASON BROWN.

HANCOCK, WEST & NORTH,
Solicitors for Compts.

Wm. Preston, being duly sworn on his oath, that the statements contained in the foregoing replication are true, so far as they are stated upon knowledge, and so far as the same are stated upon information he verily believes the same to be true.

W. PRESTON.

I, James A. Beattie, a Commissioner of the Circuit Court of the United States in and for this sixth circuit and district of Kentucky, at Louisville, Ky., do certify that William Preston, who is personally to me well known, this day appeared before me and subscribed and made oath to the foregoing affidavit and jurat.

Witness my hand as Commissioner as aforesaid, and my seal of office at Louisville, Ky., this seventeenth day of February, 1880.

JAMES A. BEATTIE,
Com'r. Cir. Ct. U. S., Dist. Ky.

128 *Agreement of Counsel as to taking Testimony.*

And afterwards, to wit, the 13th day of March, 1880, the agreement of counsel as to manner of taking testimony herein was filed, endorsed, to wit:

"No. 98, chy. Hancock *v.* Groos. Agreement of Counsel. Filed March 13, 1880. M. Hopkins, clerk."

In the United States Circuit Court for the Western District of Texas, at Austin.

98. George Hancock *v.* J. S. Groos. } In Equity.

It is agreed between the parties in this suit as follows:

1. The testimony of all witnesses shall be taken on written interrogatories and cross-interrogatories, by any officer authorized by the laws of the State of Texas to take depositions, and the same officer, without regard to his residence or the residence of the witnesses, may take the testimony of as many witnesses as may be desired by the party at whose instance the testimony is taken.

2. The testimony shall be taken in substantial conformity with the practice in the courts of Texas, and all mere irregularities or technical objections as to the manner of taking and return are waived, but no waiver as to competency or relevancy.

3. Interrogatories to be handed by one party to the other for crossing, without the necessity of filing and notice.

4. The evidence may be taken with or without a commissioner, as either party may desire.

WILSON & GAINES,
PEELER & MAXEY,
Sols. for Deft.
HANCOCK, WEST & NORTH,
for Complainant.

March 9th, 1880.

129 *Agreement of Counsel in taking Testimony.*

And afterward, to wit, the 14th day of January, 1882, the agreement of counsel as to manner of taking testimony herein was filed and endorsed, to wit: "98, Chy.; agreement as to taking evidence; filed Jan'y 14, 1882. M. Hopkins, cl'k.; by Sam Hopkins, deputy."

In U. S. Circuit Court, Western District of Texas, at Austin.

Geo. Hancock
98 *v.* } In Equity.
J. J. Groos.

It is agreed between the parties in this suit as follows:

1. The testimony of all witnesses shall be taken on written interrogatories and cross-interrogatories by any officer authorized by the laws of the State of Texas to take depositions, and the same officer, without regard to his residence or the residence of the witnesses, may take the testimony of as many witnesses as may be desired by the party at whose instance the testimony is taken.

2. The testimony shall be taken in substantial conformity with the practice in the courts of Texas, and all mere irregularities or
130 technical objections as to the manner of taking and return are waived, but no waiver as to competency or relevancy.

3. Interrogatories to be handed by one party to the other for crossing without the necessity of filing and notice.

4. The evidence may be taken with or without a commissioner, as either party may desire.

March 9th, 1880. WILLSON & GAINES,
PEELER & MAXEY,
Sols. for Def't.
HANCOCK, WEST & NORTH,
Sols. for Comp't.

131 *Agreement of Counsel as to taking Testimony.*

And afterward, to wit, the 14th day of January, 1882, the agreement of counsel as to taking testimony herein was filed, endorsed, to wit:

"No. 98, Chy.; agreement extending to July time for taking evidence; filed Jan'y 14, 1882. M. Hopkins, clerk; by Sam Hopkins, deputy."

G. Hancock } No. 98.
v.
J. J. Groos. } May, 1880.

It is hereby agreed that the time for taking testimony in the above cause is extended until the first Monday in July next.

Austin, Texas, May 11th, 1880.

WILLSON & GAINES,
PEELER & MAXEY,
Sols. for Def't.
HANCOCK, WEST & NORTH,
for Complainant.

132 *Agreement of Counsel as to taking Testimony.*

And afterwards, to wit, the 14th day of Jan'y, 1882, the agreement of counsel as to manner of taking testimony herein was filed and endorsed, to wit: "No. 98, Ch'y. Agreement. Filed Jan'y 14, 1882. M. Hopkins, clk.; by Sam Hopkins, deputy."

U. S. Circuit Court, West. Dist. of Texas, Austin.

Geo. Hancock
vs.
J. J. Groos. } In Equity.

1. It is agreed that the time for taking testimony in the above styled cause be further extended, and that the time for taking evidence shall not expire except upon either party giving the other 30 days' notice that he desires the evidence closed, and on such notice being given then the time for taking evidence shall expire 30 days thereafter.

2. It is agreed that all depositions in said cause that are now on file, or that may hereafter come in and be filed, may be opened by either party in the presence of the clerk, who shall endorse thereon the time and at whose request they are opened.

Signed HANCOCK, WEST & NORTH,
Sols. for Compt.

PEELER & MAXEY,
For Counsel for Walsh.

Austin, June 16, 1880.

133 This cause coming on to be heard on the 16th day of January, 1882, the complainant produced and read on the hearing thereof the following paper, viz:

A certified copy of report of C. F. Mercer to the Secretary of State of Texas, being Exhibit "F" with original bill.

NEW YORK, Sep. 25, 1845.

To the Honorable the Secretary of State of the Republic of Texas:

SIR: My last semi-annual report as the original grantee and chief agent of the "Texas Association," formed under the contract for colonization of the 29th of January, 1844, bore date at New Orleans the 31st of March, 1845.

Since then I have again visited Texas the fourth time, and in a journey of six hundred miles within the Republic by way of Franklin, Robertson county, and Stroud's settlement, three miles below the southern boundary of the lands described in that contract, have explored that portion of them lying west of the Trinity as I did in

the second visit to the Republic that lying east of that river. On my journey I contracted with Colonel Ripley Wheelock, of Wheelock, in the county of Robertson, to act as a sub-agent of the
134 Texas Association on the west side of the Trinity, and with Mr. B. Chambers, an experienced surveyor, to survey and sectionize sixteen townships for immediate settlement under Col'n Wheelock's agency.

Mr. Chambers himself accompanied in my journey from Franklin to the residence of Cl. Smith, captain of the rangers, on Chambers Creek, a branch of Richland. We there learnt that a determination existed to arrest the surveys for colonization on that side of the Trinity by force if they were prosecuted after such notice, and that Colo. Smith and his neighbor, Mr. Howe, stood pledged with a few other persons to the course of opposition to the contract of Jan'y, 1844. I desired Mr. Chambers, whose contract was signed at Colo. Smith's, and attested by him, to obtain incontestable evidence of the threatened resistance of the laws of the Republic, and to transmit it to your department.

I deem it proper here to mention before I proceed in this report that I learnt from Colonels Wheelock and Stroud and from other gentlemen of equal respectability, the less publicly known, that when the above contract was made the news of its existence was received with joy by the frontier inhabitants of Robertson county, as furnishing means of security from the depredations of the Indians on the northeast, while the Republic was threatened with a Mexican invasion on the western frontier of the Republic. I also understood from those gentlemen and others while I spent twelve days at
135 Franklin copying the county map, that the above sentiment underwent an entire revolution as soon as peace was made with the Indian tribes who had refused to treat the preceding autumn and on the failure of Mexico to execute her threats of invasion. From the surveys of the country I also learnt that the official communication by the surveyor-general of the lines of my contract, which have natural corners in Robinson, and could not be mistaken, had been purposely kept back by the bearer or his agent, while a rush into the lands set apart for colonization to make private locations has been manifested by the fact that, with a full knowledge from report of the existence of my contract, more than nine hundred surveys were made subsequently to its date.

As no threats had discouraged me from the prosecution of my rights and those of my associates the preceding year, and the result had been the settlement on the granted lands of more than 220 emigrant families, I made it a point to execute my contract with Mr. Chambers in the presence of Ge. Smith, and to pay him in advance a sum for his outfit which I deemed sufficient At the same time I assured him, an assurance subsequently realized, that a sufficient deposit should be made of funds in the hands of my then mercantile firm of T. G. Lindenberger *and* Co., of New Orleans, to meet all his

future demands. A like advance I had made to Col. Wheelock. My journey was much retarded by high waters, which
136 I had to swim at the hazard of my life, for I never learnt that art myself; and my pony was a recent purchase, heavily burthened with myself and baggage. I reached, after being four times lost on my way, the town of Bonham, on the ; and having closed all my subsisting accounts there to the satisfaction of the claimants, and completed the instructions of my sub-agent, Doctor Daniel Rowlett, as well as made provisions for the prosecution of the surveys on the east of the River Trinity, and prepared a map of the grant from the recent surveys, I left Bonham on the of June, and Texas by crossing Red River on the 13th of that month.

From Fort Towson, I proceeded by way of Washington, in Arkansas, to Little Rock, the capital of that State; thence to Rock Roe, on White River, and down *and down* that river and the Mississippi to New Orleans, where I arrived on the day . I was detained there by the publication of the map I herewith transmit, and of the accompanying contracts and terms of colonization, and providing 1,000 copies of them a fortnight, during which I enlarged the deposits necessary to meet the drafts of my sub-agents.

I next proceeded by way of Jonesville and Cincinnati to St. Louis and to Alton, above the mouth of the Missouri, by water, and taking the stage at the latter, I traversed the interior of the States of Illinois and Indiana, visiting their capitals and inferior towns, and
137 causing the terms of colonization to be advertised in eight newspapers of general circulation; at the public houses on the road these terms were set up in the form of hand-bills by the side of their doors throughout this journey. In the course of it I also dispersed copies of the map and contracts before mentioned, and personally conversed with the editors of the Gazette, and many new as well as old acquaintances, formed during twenty-three years' service in the House of Representatives of the United States, on the subject of those terms and the circumstances of the country to which they invited emigration. I particularly sought to gather information, and to disperse it, in relation to the best practical mode of settling prairies remote from woodland, and the substitution of wind for water mills, which I had heard and found to be successfully operated in Illinois. I reached Louisville by way of Madison, in Indiana, and there learning that the Texas Emigration and Land Company, of which I used to be a copartner in, the preceding autumn had advertised in Europe, as well as the United States, an extension to the 1st of July, 1846, of the grant of moiety of each section they proposed to colonize.

I conformed my terms to theirs, announcing, as will be perceived, that after that date but 200 acres would be allowed to every emigrant family. The least quantity exceeds by 40 acres the require-
138 ment of the contract of January, 1844, and its expediency of the reduction results in part from the obvious necessity of economizing the woodland, which, to the early emigrant, would

prove more attractive than prairies remote from timber for building, fencing and fuel, a prejudice it has taken much time to overcome, and found in Illinois and Indiana; for, as to the poor man, it is a prejudice to consider the forest preferable to the prairie. An experienced farmer would rather have a prairie without wood, than wood with no prairie. From Louisville I ascended the Ohio to the western counties of Virginia, where I had sought the preceding autumn to remove objections to a settlement in Texas. There I renewed these efforts in the large circles of society gathered at the various watering places near the Alleghany. I arrived at this place more especially to accomplish two objects: to obtain mechanics for the new town Tenton laid off on the east bank of the Trinity, first at eight, now at 28 miles, below the junction of the Bois d'Arc or East Fork with the main river, Dr. Rowlett having preferred a bluff there to the one previously contemplated as a site for the commercial entrepot of the new colony. My second object was to open thro' German houses in this city a direct intercourse with their native country, and to facilitate the introduction of emigrants from among a people distinguished alike for frugality as well as industry and perseverance, and who now emigrate with abundant means of promptly pro-
139 viding the comforts as well as necessaries of life. For this purpose I am now in daily correspondence with Mr. Sand, of Switzerland, the highly respected ex-president of the German Emigration Company of this city.

I have already stated all the contracts I have or any of my agents have made since my last annual report, and all that remains for a fulfillment of the conditions of the two contracts, of which printed copies accompany this report, is to furnish a statement of the expenditures of myself and sub-agents, and a list of my present associates, which varies by means of recent transfers and some forfeitures since my last. The total expenditures, so far as it has been ascertained, and except the sum of 96 dollars due to Mr. Patton or his order, and not called for, it is believed that all is included, amounts, with that claim, to 5,235 $\frac{4}{10}$ dollars, and it appears from a careful examination to have arisen under the following heads:

To surveyors, including the salary of Mr. Sillows.....	$2,883.50
For printing and advertising terms of colonization and subscription to Texian newspapers	241.60
For eleven hundred weight of ammunition in store in Bonham, and its carriage from New Orleans.....	119.25
Postage and stationery for 20 months.....	83.54
Commission to T. E. Lindenberger & Co. and E. Hall, and exchange on drafts.....	61.23
140 For fee of counsel for advice at various times....	50.00
For agency, exclusive of five shares of stock to Doctor Daniel Rowlett, east of the Trinity.....	50.00
For loan to Tach, an emigrant secured in Florida.....	40.00
For interest on advances of money, now exceeding two	

thousand dollars, and averaging $1,600 for the twenty months last past	160.00
For horse and full equipment left for future use with Judge Trimble, near Washington, Arkansas	55.00
Expended by the chief agent in traveling and all other personal provision and accommodation, including medicines and physician's bills for twenty months	1,368.30
Making a total sum of	$5,235.41
From which, deducting $3,050 received from the association	3,050.00
And the payments in advance to this date amount to	$2,185.41

Besides which a sum to meet future drafts remains in New Orleans.

The present members of the Texas Association are as follows:

Names.	Residence.	Shares of each.	Sums p'd.	To be paid hereafter.
1. Edward C. Cabell	Florida	6	$600 00	$2,400
2. Rich'd T. Birchett	do.	3	300 00	1,200
3. Charles H. Dupont	do.	3	300 00	1,200
4. Benjamin F. Whitner	do.	3	150 00	1,350
5. Rev'd H. McBride	do.	3		1,500
6. S. T. Bailey	Georgia	2	200 00	800
8. A. H. & E. M. Garnett	Virginia and Florida	1	200 00	300
10. Thomas Brown & James T. Archer	Florida	1	100 00	400
12. Wm. L. Haywood & Dr. Randolph	do	1	100 00	400
14. T. E. Lindenberger & W. H. Brodie	New Orleans	1	100 00	400
15. E.G. Booth, late of Florida	Virginia	1	100 00	400
16. H. L. Rutgers	Florida	1	100 00	400
141 17. N. P. Bemis	do.	1	100 00	400
18. John G. Camp	do.	1	100 00	400
19. W. C. Lewis	do.	1	100 00	400
20. Lorimer	do.	1		500
21. G. Washington Anderson	Louisville, Ky.	1	100 00	400
22. Lunsford T. Yandell	do. do.	1	100 00	400
23. Francis Griffin	Mississippi	1	100 00	400
24. James Craig	Louisville, Ky.	1	Lately taken.	500
25. Dr. McCormick, U. S. A.	Of Gen. Garner staff	1	do.	500
26. Dr. Daniel Rowlett, sub-agent	Bonham, Texas	5	Services rendered & to be rendered.	
27. C. F. Mercer, original grantee	New Orleans for the present	54½		
25. J. Elliott, by purchase of ⅘ of a share of the grantee stock	Bowling Green, Ky.	0⅘	Of C. F. Mercer's own stock, or 55 shares reserved.	
	Shares...	95	$2,950 00	$14,550

28 associates, holding 95 shares, have paid 2,950. They owe $550, and have to pay, after discharging that debt, for other installments on 35 shares. Five shares remain to be disposed of out of the 40 set apart to defray the expenses of colonization. Four stockholders have paid nothing yet reported; the two—the Rev. J. Craig and Dr. McCormick—are supposed to have paid each $100, and for 100 paid by the former, as is supposed, credit is given on reporting the same received to be $3,050 instead of the above $2,950. Messrs. Griffin and Mr. Garnett have paid their second installments. To the above resources is to be added the fees of survey charged the emigrant families, supposing their number to be now 250; at which it is confidently rated this resource amounts to $2,000, and is ex-
pected to be expended in aid of the remittances for surveyors
142 and agencies and fees of counsel. To stimulate the spirit of improvement the agent is preparing a list of premiums for agricultural and horticultural productions as well as home manufactures, and he hopes, at no distant period, to behold the erection of school-houses and places of public worship, and the clearing out of the obstruction in the navigation of Trinity from Dallas above the grant to the bay of Galveston.

All of which is respectfully submitted.

CHARLES F. MERCER,
Original Grantee and Chief Agt. of the Texas Association.

THE STATE OF TEXAS,
Department of State. }

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing ten pages are a correct transcript of a report of Charles F. Mercer, chief agent of the "Texas Association," bearing date Sept. 25th, 1845, as filed in this Department.

In testimony whereof I have hereunto signed my name and caused seal of the Department of State to be affixed at the city of Austin this the 13th day of February, A. D. 1874.

[L. S.] A. W. DE BERRY,
Secretary of State.

143 And complainant also produced and read upon the hearing the following report of C. F. Mercer to the Secretary of State of Texas, dated February 1st, 1847, the same having been made Exhibit H to the original bill of complaint:

To the Honorable Secretary of State of Texas.

SIR: In compliance with the terms of my contract of the 29th of January, 1844, with the Republic of Texas, I beg leave to enclose a correct list of the members of the Texas Association which that contract authorized me to form.

The title of the association has undergone no change since my

first semi-annual report, tho' by forfeitutes and transfers of stock the members of the association have undergone many changes, as a comparison of my reports, of which this is the seventh in number, will manifest.

I have the honor to be, very respectfully,

Your obedient servant,

C. F. MERCER,

Original Grantee and Chief Agent of the Texas Association.

New Orleans, Louisiana, Feb. 1st, 1847.

144 *List of the Stockholders in the Texas Association.*

	No. of shares.	Names of associates.	Place of abode.
1	6	Edward Carrington Cabell	Tallahassee, Florida.
2	3	Richard T. Birchett	do.
3	1	Henry L. Rutgers	do.
4	1	Nathaniel Bemiss	do.
5	1	William H. Haywood	do.
6		and James H. Randolph	do.
7	1	Thomas Brown	do.
8		and James Archer	do.
9	1	Benjamin C. Lewis	do.
10	1	John G. Camp	do.
11	1	Asa B. Clarke	do.
12	1	Robert S. Haywood	do.
13		and Richard Haywood	do.
14	1	Benjamin T. Allen	do.
15		and Edward Houston	do.
16	1	Pleasants W. White	Quincy.
17	3	Charles H. Dupont	do.
18	3	Benjamin F. Whitner	Leon Co'ty.
19	1	Thomas E. Lindenberger	Tallahassee.
20		and William H. Brodie	St. Marks.
21	1	George W. Anderson	Louisville, Kentucky.
22	1	James Craik	do.
23	1	Henry C. Hart	Paris.
24	1	Edward H. Taylor	Frankfort.
25	1	Lunsford P. Yandell	Louisville.
26	1	Francis Griffin	Foot of Island 85, Mississippi.
27	2	Samuel T. Bailey	Macon, Georgia.
28	1	James H. Stark	Butts Co'ty.
29	1	Jacob Martin	Pike Co'y.
30	1	Edwin G. Booth	Block's & White's P. O., Nottaway Co'ty, Virginia.

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31	1	Alfred H. Garnett	Loutt's P. O., Essex Co'ty, Virginia.
32		and Edward M. Garnett	Leon Co'ty, Florida.

33	4/5	Jacob Elliott	Elizabeth Town, Kentucky.
34	1/5	George W. Bartlett	Tallahassee, Florida.
35	2	Thomas Cloxton Taylor	Baton Rouge, Louisiana.
36	1	James H. T. Lorrimer	Leon Co'ty, Florida.
	58	Charles Fenton Mercer	Tallahassee.....do.
Total	100		

The preceding is a correct list of the members of the Texas Association, and was so in August last, except with the exception of the name and interest of Thomas Claxton Taylor, which he acquired in January last.

New Orleans, Louisiana, Feb. 1st, 1847.

C. F. MERCER,
Original Grantee and Chief Agent of the Texas Association.

STATE OF TEXAS,
Department of State.

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing three pages are a true and correct transcript of list of stockholders of the Texas Association as filed and recorded in this Department February 1st, 1847.

In testimony whereof I have hereunto signed my name and caused the seal of the Department of State to be affixed at the city of Austin this 11th day of February, A. D. 1874.

[L. S.] A. W. DE BERRY,
Secretary of State.

146 And complainant also produced and read upon the hearing the following report of C. F. Mercer, which was made Exhibit D to the bill of revivor and supplement:

BONHAM, FANNIN CO., TEXAS, July 11th, 1844.

To the Hon. Anson Jones, Secretary of State, Republic of Texas.

SIR: I am instructed by the "Texas Association" under the provisions of the contract provided on 29th January last between his excellency Sam Houston, President of the Republic of Texas, acting in behalf thereof, and Charles Fenton Mercer and such associates as he may choose, to transmit to the Secretary of State or other proper officer of the government of Texas a list of the copartners chosen in pursuance of the above contract and a statement of the share or shares of each in the stock or property of the association or company formed by them, and also of the common name or title assumed by them, or a majority of them in interest, to the said department; and this statement is required to be repeated once in every six months.

In pursuance of the above instruction and obligation I beg leave to report that the name or title assumed by a majority in
147 interest of the shareholders is, as above stated, "*The Texas Association,*" and that the following persons are the share-

holders or copartners of the said association, and have therein the amount of interest set opposite to their respective names, viz: Edward C. Cabell, attorney at law, of Tallahassee, in Florida, son of Chief Justice Cabell, late Governor of Virginia, and Richard Birchett, late of Petersburg, Virginia, and now clerk of the Superior Court of Law and Equity for the county of Leon, in Florida, are entitled to five shares of the 100 into which the entire interest granted by said contract to Charles Fenton Mercer and such associates as he might choose has been divided.

John R. Cooke, attorney-at-law, of this city of Richmond, in the State of Virginia, is entitled to five shares, or $\frac{5}{100}$ths of said interest.

Dr. Daniel Rowlett, of Fannin county, Texas, to $\frac{5}{100}$ths, or shares thereof. Dr. Alfred H. Garnett and Henry Waring, of Essex county, and State of Virginia, to $\frac{5}{100}$ths, or shares of said interest. General Thomas Brown and James T. Archer, of the city of Tallahassee, in Florida, to one such, save as aforesaid. Dr. William R. Hayward, of the city of Tallahassee, in Florida, to one such share. Robert J. Hayward, of the said city, to one such share. James T. Lorrimer, of the said county of Leon, to one such share.

148 Joseph Rudesell, of the said city, to one share. Alfred A. Fisher, of the said city, to one share.

Thomas Duvall, Secretary of the Territory of Florida, to one share.

George T. Ward, of the said county of Leon, to one such share.

Benjamin C. Lewis, of the said city of Tallahassee, to one share.

Messrs. Rafferty & Kindon, of the said city, to one such share.

Henry Livingston Rutgers, of said city, to one such share.

Nathaniel Bemiss, of said city, to one such share.

David C. Wilson, of said city, to one such share.

Robert White, of said city, to one such share, and Charles Fenton Mercer, of said city, to the residue of the 100 shares, into which the entire interest or stock of the association is divided.

Of these shares, Charles F. Mercer is in treaty for further subscriptions of stock to the amount, including the above, of fifty of the one hundred shares aforesaid.

The fifty shares, when disposed of, will provide the sum of twenty-two thousand five hundred dollars for carrying on the survey and colonization of the lands included in the agreement first

149 mentioned, according to the terms thereof.

(Signed) CHARLES FENTON MERCER,
Chief Agent of the "Texas Association."

THE STATE OF TEXAS, }
Department of State. }

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing three pages are a true and correct transcript of a paper filed in this office of date July 11th, 1844, concerning the "Texas Association," Charles F. Mercer, agent.

In testimony whereof I have hereunto signed my name, and caused the seal of the Department of State to be affixed, at the city of Austin, this the 11th day of February, A. D. 1874.

[SEAL.] A. W. DE BERRY,
Secretary of State.

150 And complainant also produced and read upon the hearing the following contract between Charles Fenton Mercer and Sam Houston, President of the Republic of Texas:

This contract, made the twenty-ninth day of January, eighteen hundred and forty-four, between Sam Houston, President of the Republic of Texas, acting in behalf of the Republic, of the first part, and Charles Fenton Mercer, late of the State of Virginia, but now of the city of Tallahassee, in the Territory of Florida, in the United States of America, and such associates as he shall choose, of the second part, witnesseth: That whereas by an act passed by the Congress of Texas, entitled an "Act granting land to emigrants," approved February 4th, 1841, the President of the Republic of Texas was authorized to make a contract with sundry persons named in the said act for the introduction and settlement of emigrants upon the vacant lands of the Republic of Texas, upon certain terms and conditions therein expressed, the provisions of which act were extended and made general, and perpetuated by a subsequent act amendatory thereof, approved the 5th of February, 1842; and whereas by a joint resolution of the Congress of Texas "to modify the provisions of an act entitled an act granting land to emigrants," approved the 16th of January, 1843, the President of the Republic of Texas was authorized to make such further contract or contracts with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of the Republic, and as shall not be inconsistent with the provisions of the said act; and whereas the said Charles Fenton Mercer is the legal representative of part of the said grantees, one of whom died in Lon-
151 don prior to the passage of the act of the 4th of February, 1841, before mentioned, and five others of whom assigned to said Charles F. Mercer, among others, their interests in the said act, and all contracts made pursuant thereto, by an assignment and transfer of their interests, dated in London, the 22d day of September, eighteen hundred and forty-one, and the said Charles Fenton Mercer is desirous to make a new contract in behalf of himself and others, his associates, to be united in one company or association for the purpose of colonizing part of the ungranted or unappropriated lands of the Republic of Texas: Now, this contract witnesseth, That the parties thereto have mutually covenanted and agreed, and do hereby covenant and agree to the terms and conditions of this contract, and bind themselves to each other for the faithful performance of the same as follows, viz: The party of the second part, for himself and his associates, his and their heirs, executors, administrators, and as-

signs, covenant and agree with the party of the first part, acting in the behalf and for the Republic of Texas, to introduce and settle within the limits hereinafter described by the party of the first part, or within such other limits as may be hereafter prescribed by the President of the Republic of Texas for the purpose aforesaid, and in accordance with the provisions of the acts aforesaid and the said joint resolution, and within the term of five years from the date hereof, as many emigrant families as he and his associates can settle within the said limits, to be hereinafter described as aforesaid, at the rate of one family for every section of one mile square of vacant and unappropriated land within said limits; and for this purpose the party of the second part and his associates, or their legal representatives, shall cause the unappropriated lands within the prescribed limits to be surveyed as needed for the purpose of settlement into sections of six hundred and forty acres, or half sections of 320 acres each, at their option, and shall cause to be built from time to time, as needed, such numbers of log-cabins, or small houses constructed of other materials, as circumstances shall require, for the comfortable accommodation of each family introduced and settled as aforesaid;

152 the number of families to be settled in each of the five years succeeding the date hereof shall not be less than one hundred in each and every year of the term. And for the better and more definite description of what is meant by the term family, the following meaning shall be understood to be expressed thereby, viz: That each family shall consist of at least a man and his wife, or of a widower and two or more children; if males, under the age of seventeen years; if females, unmarried; or if a widow and two or more children, unless one be a son above 17 years of age, in which case one child shall suffice, or of two single men over the age of seventeen years.

And the party of the second part and his associates further covenant and agree with the Republic of Texas, the party of the first part, that as soon as they shall receive a title from the Government of the Republic to any tract or tracts of 640 acres, or of 320 acres of land for the introduction and settlement of the families aforesaid, they will convey to each and every family aforesaid such number of acres of land as shall be agreed between them, the said party of the second part and his associates, and the said families respectively, but not less than 160 acres nor more than 640 acres to any one family, and that they will include in each deed of conveyance to a family a clause of defeasance requiring such family to enclose with a good fence and cultivate at least fifteen acres of the land so conveyed, and to reside upon the same for three years, or forfeit their title to the Republic; or the party of the second part shall name the number of acres stipulated to be given to each family as aforesaid, and request that the deed of conveyance be made therefor to the several families respectively, or their legal representatives, directly from the Government of the Republic; and in that case the deed for the remaining portion of a section or of two half sections, as the party

of the second part may desire, shall be made by the Government to the said party or their legal representatives.

And the party of the first part, in behalf of the Republic of Texas, hereby covenants and agrees with the party of the second part, their heirs, executors, administrators and assigns, or legal representatives, that they shall be authorized to introduce and settle em-
153 igrants within the limits hereinafter described until they shall have settled therein as many families as will entitle them to each and every alternate section of 640 acres, or to each and every alternate half section of 320 acres included, as well as to all other sections therein, according to the terms and conditions herein provided. But the said party of the second part shall not be required in any case to settle or receive or purchase any lot or tract of land, or half section or fractional part of a section, which is not of fair quality for agricultural purposes, or which is so far situated in the interior of a prairie as to render it inconvenient for settlement: Provided, however, That all the lands which have been legally located within the limits after prescribed, according to the provisions of subsisting and valid laws, shall not be settled, received, occupied or purchased, by the party of the second part, under or by virtue of this contract, shall constitute any bar to the purchase or settlement of any part of the lands hereby set apart and appropriated for colonization by the second party to this contract, or their legal representatives.

And the said party of the first part further covenants and agrees, in behalf of the Republic, to give, grant, and convey to the said party of the second part and associates, or their legal representatives, one section of 640 acres of land for each family, or two half sections of 320 acres for each and every family which they shall introduce and settle upon the lands hereinafter described and set apart for colonization, provided that each alternate section or half section of 640 or 320 acres shall be reserved to the Republic, to be purchased or not by the party of the second part on the terms hereinafter stipulated; and a full, absolute, and perfect title shall be made in the usual mode and form to the party of the second part, or their legal representatives, for each and every section, half section, or other fractional part of a section to which they may become entitled under the provisions of this contract, and the same shall be conveyed to them as soon as and whenever they shall exhibit to the Commissioner of the General Land Office of this Republic, or other proper officer thereof, in
154 manner and form hereinafter prescribed, the evidence of having surveyed the portion of land for which such conveyance is desired, and that there are comfortable small houses or cabins erected thereon, and families residing therein who have been settled thereon by the said party of the second part, or their legal representatives, the said party paying, or causing to be paid, the expenses of such conveyance as provided by the act of the 4th of February, 1841, as aforesaid; or, if the said party of the second part so request, the government shall convey the title of such number of acres as the

party of the second part shall have stipulated to convey to the several families, respectively, to said families, or to their legal representatives, directly; and the title to the residue of each 640 acres, or of any fractional part thereof, shall be, in such case or cases, made directly to the party of the second part and their legal representatives.

And the said party of the first part further covenants and agrees, on behalf of the Republic of Texas, that the said party of the second part shall be allowed, and receive from the government as a further compensation for their services and recompense for their labor and expense in introducing and settling the families herein provided for, a premium of ten sections of 640 acres or twenty sections of 320 acres of land for each and every hundred families introduced and settled as aforesaid; but no premiums for any fractional number of one hundred families shall be allowed; and whenever due evidence shall be adduced that the party of the second part, or their legal representatives, have settled one hundred families as aforesaid, the said party, or their legal representatives, shall select said premium sections within said limits from among those reserved to the Republic, provided such section shall be, where practicable, of continuous alternate sections, or fractional parts of sections, equivalent in extent to ten sections of 640 acres each; and a full and perfect title to said premium sections so selected or chosen shall be made to the party of the second part, or to their legal representatives, from the government of Texas.

And the said party of the first part, on behalf of the Republic
155 of Texas, further covenants and agrees with the party of the second part and their legal representatives, to give and grant to each settlement of one hundred families, made in pursuance of this contract, one section of 640 acres to be located as near the center of the settlement as practicable, and, on the payment by such settlement, or by the said party of the second part on their behalf, of the sum of twelve dollars in gold or silver specie into the treasury of the Republic, to grant one other section of six hundred and forty acres to each settlement of one hundred families in addition to the former; both to be conveyed directly to such settlement to aid them in erecting the necessary buildings for religious public worship and elementary or primary schools.

And the said party of the first part, in behalf of the Republic of Texas, further covenants and agrees with the party of the second part and their legal representatives, that on paying into the public treasury and obtaining the treasurer's or other proper officer's receipt for twelve dollars paid into the same, and also of the delivery for cancelment to the same or other proper officer of any bonds, promissory notes, or other audited liabilities of the Republic, to the amount of six hundred and forty dollars, the party of the second part or their legal representatives shall be entitled to demand, and shall receive from the government, a full and absolute title to six hundred and forty acres of the alternate sections reserved as aforesaid; provided

that, previous to any such grant or conveyance, the said party of the second part or their legal representatives shall furnish due evidence that for every section or fractional part of a section or sections, amounting to 640 acres of the reserved alternate sections, not comprehended in the twelve sections of every hundred granted as premium sections, or for purposes of religious worship and schools, an emigrant family has been introduced and settled in manner aforesaid, and for every part of a section stipulated to be granted to such family a conveyance, if desired, shall be made directly to such family or their legal representatives, on the terms and conditions
156 prescribed as aforesaid, relative to the conveyances to be made to the families introduced and settled in the other sections not reserved as aforesaid; and the conveyances for the residue of each alternate section, or of the balance remaining of the 640 acres of fractional sections, shall in such case be conveyed on the terms aforesaid to the said party of the second part, or to the legal representatives directly.

And it is understoood and hereby mutually agreed between the parties to this contract that all lands lying within the boundaries hereinafter described, which have not been legally located prior to the date of this contract, shall remain and be held subject to be settled in manner aforesaid, by the said party of the second part; provided, that any lands within the boundaries hereinafter described, which shall not have been located by the emigrant families hereby authorized to be introdnced and settled thereon, or appropriated under the provisions of this contract, within five years from the date thereof, revert to the Republic.

And it is further mutually covenanted and agreed between the parties to this contract, that no emigrant shall be introduced by the party of the second part, or their legal representatives, who is known to them to be guilty of any heinous crime, or to sustain a bad moral character; nor shall said party of the second part, nor any family introduced by them, be knowingly allowed to sell or to give or furnish to any Indians any spirituous liquors, nor any powder, lead, or fire-arms, or any warlike weapons; but the said party of the
157 second part shall cause each male emigrant of the age of seventeen years and upwards to be supplied and bring with him a good rifle, yager or musket, and a sufficient supply of ammunition, and the party of the second part shall keep on hand at all times, in some convenient place of deposit, such quantity of prime ammunition as will supply to each male emigrant of the age of seventeen years and upwards, settled by them, not less than one hundred rounds.

And it is further mutually agreed between the parties to this contract, that the party of the second part shall cause the lands within the limits designated in this contract to be surveyed from time to time and divided into sections of 640 acres and half sections of 320 acres, so far as the same may be practicable; and where, by reason of the intervention of large streams of water, or navigable rivers, this shall be impracticable, or it be rendered so by prior locations, fractiona

sections of greater or less dimensions than one-half may be made, and the quantity of land therein estimated and carried to the same account in all respects as the entire sections, by computing fractional sections in quantities of 640 acres, and subjecting them as far as practicable to the same conditions as are herein prescribed in relation to the entire sections or half sections of 640 or 320 acres. And of all such surveys, correct plats and copies of the field-notes shall be made, denoting therein the ranges and number of the section or half sections, and the fractional sections exceeding or falling short of one-half section; and the same, or a correct copy thereof,
158 shall be returned to the General Land Office of the Republic; and as the party of the second part shall become entitled to any section or number of sections, according to the terms of this contract, they shall be marked on said plat; and whenever the party of the second part, or their authorized agent or legal representative, shall exhibit to the Commissioner of the General Land Office of the Republic a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said party of the second part, or their legal representatives, have caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family or several families respectively therein, they shall immediately receive thereafter a full and absolute conveyance from the government of the Republic for as many sections of land of 640 acres, or half sections, or other fractional parts of sections equal in amount to 640 acres, as there shall be families certified to in such certificate or certificates; provided, that no settler under seventeen years of age, when introduced into the Republic, shall afterwards be entitled to receive lands in his own right as an original settler under this contract; and no family, or legal representative of a family, introduced and settled by the party of the second part, or their
159 legal representatives, shall be named as a settler in more than one certificate, or shall entitle the said party of the second part, or their legal representatives, to more than one section of land; but if the party of the second part, or their legal representatives, shall so request, the government shall convey the title acquired by each family as aforesaid directly to such family, and the residue of the said 640 acres to the party of the second part, or to the legal representatives of said party.

And it is further mutually covenanted and agreed that correct records of all such conveyances shall be duly kept in the General Land Office of the Republic; and whenever it shall appear that titles have been made or have accrued, according to the terms of this contract, to the party of the second part, or to their legal representatives, for the settlement of one hundred families, the government of the Republic shall convey to the party of the second part or to their legal representatives for the settlement of one hundred fam-

ilies ten premium sections, to be selected or chosen as aforesaid, and in a like manner for each and every settlement of one hundred families the two additional reserved alternate sections for religious purposes and schools within such settlement on the terms and conditions aforesaid, and so on for every other hundred families until the expiration of the term of years aforesaid allowed for the colonization of emigrants under this contract shall have expired.

And it is further mutually agreed between the parties to this contract, that until the party of the second part and such associates as they may make by transfer or assignment of a part or parts of their interest in this contract, and the lands set apart thereby for colonization on the terms and conditions herein expressed, shall obtain a charter or act of incorporation from the Congress of this Republic, they shall be authorized to appoint by a majority of their number in interest, in such mode and by such title or denomination as a majority in interest of the said association may agree on, in some instrument of writing or article of agreement and association to be drawn up and subscribed by such majority, some one or more person to act under a common name to be assumed by the said association, and under such instrument of writing to invest such person or persons with full authority as their trustee or trustees to receive and hold, for their benefit and on their behalf, according to such rules as they or a majority in interest of their company or association may prescribe in writing from time to time, the titles and conveyances of such lands, bonds, obligations, notes, or money as they shall agree by a majority in interest of their number to confide to the keeping or to the use of their said trustee or trustees. And should the majority in interest of the party aforesaid and their associates at any time desire to return or surrender such title or conveyances as they may have received in the manner aforesaid through their trustees to the government of the Republic, on due evidence of such desire made known to the said government, or to the proper officer or officers thereof empowered to make conveyances, the said government, officer or officers shall make and convey new titles to the same lands to such person or persons, party or parties, directly by name, as the party of the second part of this contract or a majority in interest of the association, which such party of the second part and their associates may, by some instrument of writing, request; and in the absence of such act of incorporation as the party of the second part, their associates or legal representatives contemplate, they shall from time to time, until such act be obtained, cause certified copies attested according to such evidence as the laws of this Republic prescribe for foreign conveyances of land, when such land is conveyed by indentures or contracts made without the limits of this Republic, to be transmitted to the Department of State or other proper department of this government for safe-keeping and reference as occasion may require. And within six months from the date hereof and once within every six months thereafter until such act of incorporation shall have been obtained,

the association formed as aforesaid shall transmit a list of their co-partners and a statement of the share or shares of each in the stock or property of the association or company and of the common name or title assumed by them or a majority of them in interest to the said department.

And it is further mutually covenanted and agreed that if an act of incorporation be obtained by the said association or company to be formed as aforesaid, all such deeds as may have been previously made to the same or to their authorized trustee or trustees may be surrendered to this government in manner aforesaid, as soon
162 as or at any time after the said act of incorporation shall have been obtained and the company organized under or by virtue of such act; and in that case new deeds corresponding with the new form of the association aforesaid shall be executed and delivered in exchange for the former to the proper officer of such incorporated association for the use and benefit thereof, the said party of the second part and their associates or lawful representatives paying all legal expenses attending such deeds of conveyance.

And it is further covenanted and agreed by the parties to this contract, that the unlocated lands included in the following boundaries shall remain and be held by the government of this Republic for the purposes herein set forth, until the end of five years from the date hereof, and shall be considered as set apart, exclusively of all future claims, to be colonized in the manner aforesaid, by and for the benefit of the party of the second part aforesaid, and of this Republic, viz.:

Beginning on Red River, to the opposite bank of the east branch thereof, emptying into the same from the United States of America, called the False Washita, and running thence due south fifty miles; thence due east fifty miles; thence due south sixty-five miles; thence by a straight course to a point on the Rio Trinidad, or River Trinity, on the bank opposite the lower or southern bank of Cedar Creek, where the said creek empties into the said river; thence across the River Trinity to said bank of Cedar Creek; thence by a straight line to the lower or southern bank of Aquilla Creek, where the said
163 creek unites with the River Brazos; thence up the said River Brazos, according to the meanders of the same, and binding thereupon, to the intersection of the same by the new Indian boundary described in the act of Congress entitled "An act to provide for the establishment and maintenance of peace, and to regulate friendly intercourse with the Indians," on which was grounded the treaty with the Indians made in September last; thence with said boundary, wherever the same may be run and established under the said act, and the treaty made, or to be made pursuant thereto, to the southern boundary of the tract of land set apart for colonization by a contract bearing date the twenty-sixth of July, 1842, between Isaac Burnham, acting for himself and as agent for and in behalf of W. S. Peters and others, of the first part, and Sam Houston, President of the Republic of Texas, on behalf of the said Republic, of the

second part; and thence with the said Indian boundary, or the southern boundary of said tract of land set apart as aforesaid for colonization by the said contract, to the southeast corner of said tract set apart as aforesaid; thence with the east boundary of said tract due north, or with the Indian boundary, should the same be east of the said eastern boundary aforesaid, to Red River; and thence to and with the meanders of Red River, down the south margin thereof to the northwest corner of the tract of land set apart for colonization, as aforesaid, by a contract made pursuant to the act of Congress of the fourth of February, 1841, between the Pres-
164 ident of the Republic, of the first part, and W. S. Peters and others of the second part, which contract bears date the twentieth day of August, 1841; thence with the western boundary of said tract, and of another tract set apart as aforesaid, by a contract between the same parties, for the same object, running due south to the southwest corner of said last named tract; and thence with the southern boundary of the same to the southeastern corner thereof; and thence with the eastern boundary of said tracts to the beginning of the first of the two last described tracts, at the mouth of Big Mineral Creek where the same empties into Red River; and thence with the meanders of said river and binding thereon to the beginning, opposite the lower bank of False Washita, where the same empties into the Red River.

And it is further covenanted and agreed between the parties to this contract, that unless the party of the second part, or their legal representatives, shall, prior to the first day of May, 1845, have introduced and settled on the land above mentioned, according to the tenor of this contract, one hundred families, all right and title of the said party of the second part, or their legal representatives, to proceed further in the execution of this contract, shall cease and determine from the moment of such default, but such default shall not work or operate retrospectively, but leave to the party of the second part, and all persons claiming under them, whatever right, title, or interest they may have acquired from the action of the party
165 of the second part and their legal representatives prior to such default, to the same extent as if no such default or failure had occurred; and in like manner, and under like qualifications, the right of the said party to proceed further under this contract shall cease and determine; provided 250 families be not introduced and settled by them in manner aforesaid on or before the expiration of two years from the date hereof; and so in like manner one hundred and fifty additional families shall be settled on the said lands, according to the terms of this contract, by the said parties of the second part, or their legal representatives, within each of the three remaining years, or the right of the said party to proceed further under this contract, through the full term of five years from the date hereof, shall on the occurrence of any default as aforesaid utterly cease and determine; provided, as before expressed, no such default shall operate otherwise than prospectively, either in relation to the said second

party to this contract, or to the emigrant families actually settled, or any person or persons claiming by, through or under them, or any of them.

And it is further covenanted and agreed between the parties aforesaid, to obviate any misunderstanding of the terms on which it is agreed, that the party of the second part may purchase and settle any number of families on the alternate reserve sections as
166 aforesaid; that the like compensation or recompense in land for every hundred families settled thereon, and the like provision for public worship and elementary schools, shall be made to the party of the second part and their legal representatives, and to each settlement, as in the case of the introduction and settlement of the same number of families upon any other sections not so reserved; and for such premium sections, and the two sections allotted for religious purposes and schools, the party of the second part shall not be required to pay more than the twelve dollars in specie required by the said joint resolution of the Congress, approved the sixteenth of January, 1843.

In testimony whereof, the party of the first part to this contract hath hereunto subscribed his name, and caused the seal of the Republic of Texas to be affixed; and the party of the second part hath subscribed his name and affixed his proper seal on the day and year in this contract first mentioned. Done at the town of Washington, on the twenty-ninth day of January, and of the Independence of Texas the eighth.

[L. S.] SAM HOUSTON.
[L. S.] CHARLES F. MERCER,
For himself and such associates as he may choose.

Attest: ANSON JONES,
Secretary of State,

167 DEPARTMENT OF STATE,
Austin, Texas.

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original colonization contract made by Charles Fenton Mercer and others with the President of the Republic of Texas, and now on file in the archives of this office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the State Department at the city of Austin this the 6th day of March, A. D. 1875.

[L. S.] A. W. DE BERRY,
Secretary of State.

EXECUTIVE OFFICE,
Austin, Texas.

I, Richard Coke, Governor of Texas, do hereby certify that A. W. De Berry, whose signature appears to the above certificate, was,

at the time of signing the same, Secretary of State of the State of Texas; that his attestation thereto is in due form and by the proper officer.

In testimony whereof, I have hereunto signed my name and caused the great seal of State to be affixed at the city of Austin this the 6th day of March, 1875.

By the Governor.

[L. S.] RICHARD COKE,
Governor.

A. W. DE BERRY,
Secretary of State.

168 Complainant also produced and read on the hearing the following, viz:

Original Covenant and Agreement between C. F. Mercer and the Settlers, being Exhibit "B" to the Original Bill.

This instrument witnesseth, that the persons who have subscribed and undersigned their names hereto do hereby severally, but not jointly, agree and covenant as follows, to wit:

That each of us has received of Charles Fenton Mercer and his associates, known as and comprising the "Texas Association," a certificate issued in accordance with a contract made on the 29th day of January, A. D. 1844, between them and Sam Houston, then President of the Republic of Texas, acting in behalf of the said Republic, authorizing them, among other things, to introduce and settle emigrant families upon the lands within the limits specified in said contract; the number and date of each certificate granted by said association, and by us received, being expressed and written in spaces to the left hand of our respective names, which certificates are received and held for the benefit of the respective families mentioned therein, each one of us forming a member of the family described in the certificate delivered to him, which families have been specially introduced and settled at the times and in manner and form as stated and expressed in said certificates respectively by the said Mercer and his associates, and have emigrated as the
169 said certificates declare and show. And in consideration of the premises and the benefits from said certificates, and the contract aforesaid accruing and to arise, that we will severally observe and perform, as far as may be in our power, the several duties and requirements devolving upon us as settlers under said contract, whether prescribed by the terms thereof, or by the laws of the land in such behalf especially. We bind ourselves severally not to give, sell, or in any way furnish to any Indian any spirituous liquor, nor any gunpowder, lead or fire-arms, or warlike weapons of any description; and, moreover, to abstain from any waste or trespass upon the half sections adjoining those on which we have respectively settled, and on the whole sections adjoining thereto, and to guard the same

from waste or trespass by others, and to protect the same from settlement by any other persons not authorized to settle thereon by the said association, or some legally authorized agent thereof; and to pay the sum of five dollars in materials, labor or money, towards the building of a school-house of such dimensions and on such site as the said association or its agent may direct. Also that each family specified or referred to herein, each one certifying alone for his own family, has and occupies a suitable cabin or house as described in said contract, and that each male member thereof of the
170 age of seventeen years and upwards is supplied with a good rifle, yager or musket, and a sufficient supply of prime ammunition.

No.	Date of Introduction.	Name.	Witness.
1	31st of March, 1845...	Robert × Lea.....	P. J. Pillians.
2	" " " ...	William G. Lee.....	"
3	1st Jan'y, " ...	Jane × Warden.....	"
4	" " " ...	Thomas C. Byrd.....	"
6	30th October, 1844...	David Shapard	"
7	1st Feb'y, 1845.....	Richard Byrd.....	"
8	11th " "	Thomas × Proctor...	"
9	15th " "	William Garrett.....	"
10	1st Dec'r, 1844.....	Jonathan Wilkins...	Thos. C. Bean.
11	24th " "	Orange B. Prentiss...	P. J. Pillans.
12	4th October, "	Isaac Wilkins.....	"
13	23d Feb'y, "	Marshall Crawford...	James Hilhouse.
14	25th Dec'r, "	Mary Wilkins.....	Thos. C. Bean.
15	15 M'h, 1 F'y, 1845...	George + Sterett.....	"
16	" " " " " ...	Jesse × Yarborough.	P. J. Pillans.
17	26th Feb'y, " ...	Peter × Lee.....	"
18	" " " ...	Wm. Allen Brown...	"
19	25th " " ...	Wiley Jones	"
20	15th Nov'r, 1844.....	Milton D. F. Gerald.	James Hilhouse.
21	31st December, 1844	John + Carter.....	P. J. Pillians.
22	25th " "	Mathew R. Wilkins.	"
23	24th " "	Silas M. Havins.....	"
24	1st January, 1845...	John Garrett	"
25	" " " ...	Thomas Havins	Thos. C. Bean.
26	" " " ...	John P. Havins.....	P. J. Pillians.
27	1st Dec'r, 1844.....	Wm. McCarrell.....	"
28	25th " "	Franklin Marrs	"
29	24th June, "	David H. Havins ...	"
30	14th Feb'ry, 1845...	Mark Rushing.....	"

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31	15th Feb'y, 1844.....	Alexander D. Havins.	P. J. Pillans.
32	14th " 1845.....	H. Thomas Click.....	Thos. C. Bean.
33	1st Dec'r, 1844.....	Lewis Marr.....	P. J. Pillans.
34	15th Oct'r, "	Hiram Shelly.....	"

No.	Date of Introduction.	Name.	Witness.
35	1st Feb'y, 1844.....	King × Fisher.....	P. J. Pillans.
36	" " "	Moses × Fisher.....	"
37	10th Jan'y, 1845.....	Joseph M. × Stuman.	"
38	10th Feb'y, 1844.....	Sterling Shumat.....	"
39	1st " "	James Hobbs.....	"
40	15th " "	William Downing...	"
41	" " "	Abraham Watson....	Thos. C. Bean.
42	12th Nov'r, "	Wiley Steel.....	P. J. Pillans.
43	1st Jan'y, 1845.....	William Pinethorf...	"
44	7th Dec'r, 1844.....	Simon Odell.....	"
45	25th " "	John Odell.....	"
46	" " "	John Odell.....	"
47	1st " "	Thomas × Clevinger.	"
48	7th " "	Nehemiah Odell.....	"
49	1st " "	Turner × Odell.....	"
50	" " "	John Wallace.....	"
51	25th " "	Elizabeth × Friend.	"
52	15th March, 1845.....	Elizabeth × Robinett.	"
53	" " 1844.....	Culonius Beckhart...	"
54	25th Dec'r, "	George Bullock.....	"
55	15th Sept'r, "	John Dunn.....	"
56	10th Feb'y, "	William W. Hobbs...	"
57	15th " 1845.....	Johnson Shelton.....	"
58	" " "	Lemuel Shelton.....	"
59	27th Dec'r, 1844.....	John × Custer.....	"
60	10th April, 1845.....	James Garrett.....	"
61	1st Feb'y, 1844.....	William Stephens....	"
62	25th Feb'y, 1845.....	Thomas × Speer.....	"
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63	10th Feb'y, 1844.....	James W. Stephens..	William Stephens
64	15th Oct'r, "	Joseph Prewett.....	"
65	1st Feb'y, 1845.....	Drewry B. Koen.....	P. J. Pillians.
66	6th " "	Wyatt Parker.....	"
67	" " 1844.....	Jacob H. Drean.....	"
68	15th Feb'y, 1845.....	Jesse Henshaw.....	"
69	15th Aug., 1844.....	Daniel J. Gilmore....	Thos. C. Bean.
70	15th Feb'y, "	William K. Newell...	"
71	" " "	Chas. R. Saunders, Sr.	"
72	" " "	Henry K. Newell.....	"
73	" " "	Chas. R. Saunders, Jr.	P. J. Pillans.
74	5th Jan'y, 1845.....	Mathew Lancaster....	"
75	" " "	Sterling × Lancaster.	"
76	" " "	Rob't P. × Lancaster.	"
77	" " "	James × Powell.....	"
78	" " "	B. B. Dowell.....	"
79	8th Feb'y, 1845.....	George × Reeves.....	"
80	15th " "	Peter × High.....	"

No.	Date of Introduction.	Name.	Witness.
81	12th Mar., 1845.....	John W. × Shirley...	P. J. Pillans.
82	Jan'y 2nd, "	Thomas Denton.....	"
83	Nov'r 15th, 1844.....	Henry Hunter.....	"
84	Jan'y 2nd, 1845.....	George B. Denton ...	"
85	Jan'y 6th, "	Alfred × Carlyle.....	Thos. C. Bean.
86	" 2nd, "	John M. Denton.....	P. J. Pillians.
87	" 1st, "	James Noble.....	Thos. Denton.
88	Mar. 4th, "	A. C. Ransom.....	P. J. Pillians.
89	Feb'y 8th, "	John × Harden.....	Thos. C. Bean.
90	Jan'y 1st, "	David Carlyle.....	"
91	Jan'y 15th, "	Henry × Ratts.....	P. J. Pillans.
92	" 22, "	Willson Fogeman....	"
93	" " "	Daniel × Rogers.....	"
94	" " "	Andrew H. Henry...	"
173			
95	Jan'y 22, 1845.....	Jesse Zinc.....	P. J. Pillians.
96	" " "	John S. Beck.....	H. H. Henry.
97	15th Jan'y, "	Thomas J. White.....	Thos. C. Bean.
98	12th June, 1844.....	Larker Cupps.....	P. J. Pillians.
99	2nd Jan'y, 1845.....	Nath'l Daugherty.....	"
100	15th Feb'y, 1844.....	Reuben Deweye.....	"
101	" " "	William × Paddix...	"
102	2nd " 1845.....	Wm. Daugherty.....	Thos. C. Bean.
103	" " "	H. M. Daugherty.....	Wm. Daugherty.
104	" " "	N. Daugherty	Thos. C. Bean.
105	Feb'y 13th, 1844.....	Jacob Deweye.....	Wm. Daugherty.
106	Dec. 13th, "	Leonard Eastwood...	P. J. Pillians.
107	" " "	Alexander Eastwood.	"
108	" 19th, "	William S. White....	Leon'd Eastwood.
109	" 13th, "	John × Eastwood....	P. J. Pillians.
110	April 5th, 1845.....	James M. × Mauer...	"
111	Dec'r 13th, 1844.....	John Damron.....	"
112	" " "	John J. Damron.....	"
113	Jan'y 8th, 1845.....	Thacker Vivian.....	"
114	" " "	James Vivian and Thomas Vivian....	Thacker Vivian.
115	Feb'y 1st, "	Victor Punell	P. J. Pillians.
116	" " "	Elisha × Browning...	"
117	Dec'r 20th, 1844.....	John Pennington.....	"
118	" " "	Levi Pennington.....	"
119	Mar. 15th, 1845.....	Brown C. Roberts....	John Miller.

THE REPUBLIC OF TEXAS,
County of Fannin.

We, Daniel Rawlett, one of the Texas Association, and P. J. Pillans and Thos. C. Bean, two disinterested persons, each of us being

sworn, do depose and say that the above and foregoing list
174 contains a true and accurate account and statement of emigrant families as certified to by the heads thereof to have been specially introduced and settled by Charles Fenton Mercer and his associates, known as and comprising the Texas Association, prior to the first day of May, 1845, upon and within the limits of the grant made by the Republic of Texas to said Mercer and his associates on the 29th of January, 1844, and referred to in the certificate subscribed to by the heads of the families respectively, which families are particularly described in the certificates given to each head of a family for 320 acres of land each and for no more nor a less quantity, and that the number of each certificate agrees with the number in the left hand column opposite to their respective names; that number 5 on page two of the foregoing five pages was made blank by the disagreement of two unmarried men over the age of 17 years, and that the Texas Association have furnished the prime ammunition as contemplated in their contract with the Republic of Texas on the 29th of January, 1844, and have now on hand and and in deposit with W. W. Porter, in Bonham, say ten kegs of prime gunpowder and 900 pounds of lead.

D. RAWLETT.
P. J. PILLANS.
THOMAS C. BEAN.

175 REPUBLIC OF TEXAS, }
County of Fannin. }

This day personally appeared before me, the undersigned, a justice of the peace in and for said county, Daniel Rawlett, P. J. Pillans, and Thomas C. Bean, who swore to and subscribed the foregoing certificate and deposition.

Given under my hand at Bonham this 2d day of August, 1845.

JOHN TURNER,
Justice of the Peace, Beat No. 1, F. C.

REPUBLIC OF TEXAS, }
County of Fannin. }

This is to certify that John Turner was an acting Justice of the Peace at the time of his signing the foregoing instrument.

Given under my hand and seal of the County Court, this 2nd day of August, A. D. 1845.

[L. S.] R. W. LEE, *Cl'k County C., F. C.*,
By THOMAS C. BEAN, *Dep. Clerk.*

GENERAL LAND OFEICE,
AUSTIN, February 13, 1874.

I, J. J. Groos, Commissioner of the General Land Office, do hereby certify that the above and foregoing 9 pages contain a true and correct copy of the original instrument on file in said office.

176 In testimony whereof I hereunto set my hand and affix the impress of the seal of said office, the date last above written.

[L. S.] J. J. GROOS, *Commissioner.*

Complainant also produced and read upon the hearing the following, viz.:

Form of certificate of stock in the Texas Association, the same having been made Exhibit "R" with bill of revivor and supplement.

The Texas Association.

Share No. .....

This is to certify that ..... is entitled to share No. ....., being a hundredth part of the stock of "The Texas Association," formed under the authority of the Republic of Texas, according to the terms of a contract or agreement for colonizing certain lands in Texas, made on the twenty-ninth day of January, eighteen hundred and forty-four, "between Sam Houston, President of the Republic of Texas, acting in behalf thereof, and Charles Fenton Mercer and such associates as he may choose," which said contract is duly attested by Anson Jones, Secretary of State of the Republic, and the great seal thereof, is in the words and figures of the printed copy hereto

177 annexed, with the certificate appended of the Chief Clerk of the Department of State.

This share of stock is held subject to all the obligations, conditions, and limitations, and with all the rights, privileges, and immunities stipulated and expressed in the above contract, and in the subsequent agreement between Charles Fenton Mercer, the original contractor, and the several associates he hath chosen, of which last agreement a printed copy is hereto annexed. This share may be transferred or assigned by the subscription or endorsement of the original holder, ..., or of his legal representative, on notice of such subscription or endorsement being communicated to the said Charles Fenton Mercer, or any person who shall succeed him as chief agent of the Texas Association; and the assignee and his legal representatives shall thereafter be substituted for and entitled to all the rights, privileges, and immunities, and be subject to all the obligations, conditions, and limitations of the original holder of said share, except the same be superadded to, or in any way modified by, the terms of such assignment or transfer, expressed in writing on the face of this certificate, and in such cases attested by two or more witnesses, or before a notary of some city or corporation, and his certificate of acknowledgment of said assignment or transfer subscribed thereto.

In testimony whereof the said Charles Fenton Mercer, original contractor with the Republic of Texas, and chief agent of the "Texas Association," hath hereunto subscribed his name, on the ..... day of ....., A. D. eighteen hundred and .....

178 The complainant also produced and read on the hearing the following certified copy of will of George Hancock, deceased, the same having been made Exhibit "T," with bill of revivor and supplement, viz:

In the name of God, amen! I, George Hancock, of Glencony, in the county of Jefferson and State of Kentucky, being of sound mind and disposing memory do make, declare, and publish this writing as my last and only will and testament, hereby revoking, cancelling, and declaring null and void all other wills, codicils, and writings testamentary at any time heretofore made by me.

First.—I hereby give and devise all my lands, tenements, and real estate, now owned by me, lying and being in the State of Texas, to to my beloved wife, Mary D. Hancock, her heirs and assigns, to be held by her in fee-simple forever, being the lands one undivided moiety whereof I heretofore conveyed to William Preston and the other undivided moiety whereof it is my intention to devise as aforesaid to my said wife in fee.

Second.—I hereby give and devise to my wife, Mary D. Hancock, all my right, title, interest, claim, and estate in and to the land upon which I now reside, known as Glencony, being the lands acquired by me under sales from Dr. John Moore, Elizabeth Young, and Crawley, and under the sales made by authority of decrees rendered in the Louisville Chancery Court, in the case of Woodruff *v.* Craig.

179 Upon these lands my wife has a lien on the original notes to the vendor, which are held for her use by her trustee, who purchased and took up the same and now holds the same as assignee of said original notes for the use and benefit of Mary D. Hancock, so that it is my will hereby to devise, release, and relinquish to my wife, Mary D. Hancock, all my right in and to said estate of Glencony and all buildings, messuages, and appurtenances on said tract, which contains four hundred acres, more or less; *to have and to hold* the said estate of Glencony to the said Mary D. Hancock, her heirs and assigns, to her and their own use, benefit, and behoof forever in fee-simple.

Third.—I had intended to make division of my Texas lands between my wife and my dearly beloved niece, Eliza Griffin Johnston, but under an arrangement heretofore made with her, she is, I hope, in such circumstances that it is not now necessary; and as my wife requires a proper provision, in my judgment, I have devised to her my Texas lands as aforesaid. I bequeath to my niece the family portrait of her mother and with the portrait of John Strotten Hancock, not for their intrinsic value, but as a little testimony of my regard and under the belief that she will value them.

Fourth.—I give and bequeath to my niece, Susan P. Hepburn, the six mahogony chairs of her grandfather, with his portrait, and also the portraits of my sister, Caroline H. Preston, and of my mother, Margaret Strotten Hancock.

Fifth.—I give and bequeath to my wife all my household
180 and kitchen furniture, with silver, china, carriages and horses, and all farming implements and other personal chattels in my domestic use at this time at Glencony, except the personal property and books in my office in the yard; to have and to hold to her own use absolutely. I also give her such bank notes and ready cash as may be in my possession at the time of my death.

Sixth. I devise and bequeath my library and all my books in my office to my nephew, Wickliffe Preston, requesting him to keep them together and not sell them nor give them away, and hoping that he will take care of them as a token of my love and regard; and I give and bequeath my fossils, shells, and all other personal property in the office in the yard to my nephew, William Preston. I, however, authorize my wife to take the Rees Cyclopedia and British Poets from the books hereby bequeathed and retain or dispose of them as she may choose.

Seventh. I request that no inventory, appraisement, or sale may be made of my personal estate, and hereby nominate William Preston as the executor of this will, and request that no security may be required for the execution of the trust; and in the event that he should fail to act, then I request that letters testamentary shall be issued to such person as William Preston may appoint or
181 nominate, and in default thereof to J. Stoddard Johnson, and in default thereof to Harris H. Johnson.

Seventh.—I devise and bequeath all the rest and residue of my estate, real, personal and mixed, in possession or expectancy, remainder or reversion, of every sort and description, and all bonds, notes, accounts, claims and demands to my executor, to hold the same to the payment and satisfaction of such claims as he may think just and proper, or such as may be legally adjusted or established against my estate; and I authorize my executor to compromise and adjust, settle and arrange all and any claim or claims affecting my estate; and to employ all necessary counsel and agents in his administration and execution of this will; and it is my will that any surplus or excess of assets over debts may be and shall paid over after final administration of my estate to my wife, Mary D. Hancock, or to such person or persons as she may by deed or will direct.

Eighth.—Inasmuch as I am at this time chief agent and trustee of the Texas Association under the terms and provisions of a contract of colonization made and entered into between the Republic of Texas by Sam Houston, President, and Charles Fenton Mercer, for the colonization of a certain district known as Mercer's Colony in north-eastern Texas, and as I own a large interest in the stock of
182 said association but have attempted thus far in vain to procure a satisfactory settlement of said claim with the State of Texas; and whereas said claim is still unsettled and prosecuted by me, and should be settled by said State in honesty and equity, now, by virtue of the powers created in said contract and in the articles of association of said Texas Association, I hereby

nominate and appoint William Preston in my stead to act as chief agent and trustee of said Texas Association, and to maintain and prosecute said claim, or any suit or action *bond* thereon, and to *revive* the same, and do all things which I would do under said contract and articles of association according to the terms and provisions thereof and of said contract of colonization; and if he should fail or refuse to act, then that he shall have power to nominate and appoint a new trustee or chief agent of said Texas Association, and I hereby devise and bequeath all my right, title and interest in and all my estate, stock and property in said Texas Association to William Preston, *upon condition* that he shall pay over one-half of whatever may be realized or received from said Texas Association to my wife, Mary D. Hancock, her heirs and assigns, or that his appointee or their successors shall pay over one-half of any amount realized and received from said Mercer Colony claim.

In testimony whereof, I have hereto set my hand and seal
183 this 14th day of August, A. D. 1875.

GEO. HANCOCK. [SEAL.]

Attest:
W. PRESTON,
SUSAN PRESTON HEPBURN.
DENIS LONG.

We, the undersigned, attest that Geo. Hancock, the testator, signed and published this writing as and for his last will and testament in our presence.

W. PRESTON.
SUSAN P. HEPBURN.
DENIS LONG.

The words "Griffin" on the second page was stricken out, and "Hancock" inserted, and the words between "power" and so, on the fifth line of the foregoing and last page of the will, before the same was read to and executed by the testator, George Hancock.

W. PRESTON.
SUSAN P. HEPBURN.
DENIS LONG.

STATE OF KENTUCKY.

At a county court held for Jefferson county, at the court-house in the city of Louisville, on the 21st day of October, 1875, the foregoing instrument of writing, purporting to be the last will
184 and testament of Geo. Hancock, d'cd, late of this county, was produced in court, and proven by the oath of W. Preston, one of the subscribing witnesses thereto, who also proved the attestation of Susan P. Hepburn and Denis Long, the other subscribing witnesses thereto, whereupon the same was established by the court

to be the last will and testament of said testator, dec'd, and ordered to be recorded, and is recorded in my office as clerk of said court.

Att: CH. M. THURSTON, *Clk.*

STATE OF KENTUCKY, Jefferson County. } *ss.*

I, Ch. M. Thurston, clerk of the county court of Jefferson county, in the State afs'd, do certify that the foregoing six and one-half pages contains a true and correct copy of the last will and testament of Geo. Hancock, dec'd, late of this county, together with the certificate of probate thereunto annexed, as taken from the records of my office as clerk of s'd court.

In testimony whereof, I have hereunto set my hand and affixed the official seal of s'd court at office in Louisville, this 22nd day of Oct., 1875.

[L. S.] CH. M. THURSTON.

STATE OF KENTUCKY, Jefferson County, } *ss.*

I, W. B. Hoke, judge of the Jefferson county court, in the State aforesaid, do certify that Ch. M. Thurston, who has signed the
185 foregoing certificate, is the clerk of said court duly elected and qualified; that all his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand this 22d day of October, 1875.

W. B. HOKE,
Sole Judge Jefferson County Court.

186 And complainant also produced and read upon the hearing the following demand by complainant Preston upon Walsh, as Commissioner of the General Land Office of the State of Texas, for the issuance to said Preston of certificates for land under Mercer's contract, the same having been made Exhibit "P" to the bill of revivor and supplement:

AUSTIN, TEXAS, 9 April, 1879.

To W. C. WALSH, Esq.,
Commissioner of the General Land Office of the State of Texas:

SIR: The undersigned is chief agent and trustee of the Texas Association, organized under the contract between President Houston, in behalf of the Republic of Texas, party of the first part, and Charles Fenton Mercer and his associates, party of the second part, dated 29th January, 1844, which is recorded in the Department of State at Austin, Texas. The Texas Association, being the association formed by Mercer and his associates under said contract, was, as appears from the records of said Department of State, fully organized in conformity with said contract, and it has fully performed

all the agreements, covenants, and provisions thereof, as the undersigned is ready to show and prove.

The undersigned claims that it is the duty of yourself, as Commissioner of the General Land Office of the State of Texas, to issue and deliver to him, as chief agent as aforesaid, proper cer-
187 tificates from your office for thirteen hundred and seventy-six (1376) sections of land of 640 acres each, or the equivalent in sections and half sections, according to the provisions of the said contract of Mercer with the Republic of Texas. The undersigned is ready to show and prove that the said Texas Association, and he as its chief agent and trustee, is fully entitled to said quantity of land, viz., 1376 sections.

The undersigned respectfully represents that it is your duty, as Commissioner of the General Land Office of the State of Texas, under the Constitution and laws of said State, and under the Constitution of the United States, to issue or cause to be issued the aforesaid land certificates, in the aggregate quantity of land aforesaid, in order to fulfil in good faith the covenants and agreements of Texas in said contract contained; and also that it is your official duty to abstain and to cause your subordinates to abstain from any and all issue, delivery, or recognition of any one or more land certificates for any amount of land whatever to any person, persons, or corporation whatever, as to or covering or intended to apply to or capable of being applied to any land or lands within the boundaries of what is known as Mercer's Colony, as defined and set forth in the contract aforesaid—save only to the chief agent of the Texas Association—until said just claim of the Texas Association is first fully satisfied.

Your predecessor in office, J. J. Groos, was, on the 10th of
188 March, 1874, notified of this duty and of the demand herein set forth by George Hancock, the then chief agent of the Texas Association, and said Groos, by the Attorney-General of Texas, entered his appearance to said Hancock's bill in chancery in the Circuit Court of the United States at Austin, Texas, and filed his demurrer, which has not been disposed of. The undersigned is advised that a formal demand and notice addressed to you in your official capacity is proper and requisite.

This, therefore, is to demand that you issue and deliver to the undersigned, as chief agent of the Texas Association, land certificates for 1376 sections of land, or an equivalent quantity in sections and half sections, according to the terms of Mercer's contract aforesaid, and further to demand that you do not issue or deliver, or suffer to be issued or delivered to any person, or persons, or corporation, any certificates or patents for lands within the boundaries of Mercer's Colony as defined in said contract until the aforesaid demand for 1376 sections or its equivalent shall have first been satisfied.

The Texas Association has never been incorporated. By the death of George Hancock, former chief agent of said Texas Association, the undersigned has in due form succeeded him as chief agent thereof

and has revived said suit. Full and satisfactory proof of all the foregoing statements, rights, and amounts will be made to you, if desired.

The favor of a reply indicating whether you can or will accede to this demand and notice will oblige,

Very respectfully, yours,

W. PRESTON.

189 AUSTIN, TEXAS, 10th April, 1879.

Charles S. West and John Mason Brown called together upon W. C. Walsh, Commissioner of the General Land Office of Texas, at his office, and delivered to him a true copy of the foregoing at 12 o'clock M. This memo. made immediately.

JOHN MASON BROWN.

190 And complainant also produced and read on the hearing the following agreement of Geo. Hancock with Geo. W. Paschal and E. D. L. Wicks:

STATE OF TEXAS, }
County of Travis. }

This agreement between George Hancock, president and agent of the "Mercer's Colony Company," of the first part, and George W. Paschal, junior, and Edward D. L. Wicks of the second part, witnesseth: That the party of the first part, acting for the company, hereby retains and engages the party of the second part to advocate and assist in the recovery of the land due from the State of Texas to the representatives of Charles Fenton Mercer, the founder and locator of "Mercer's Colony;" and the party of the first part binds himself, and the company which he represents, to convey and transfer to the parties of the second part fifty shares of the stock of the said company, it being intended by this contract to pay to the parties of the second part one twenty-sixth part of the value of any amount which the ultimate success of the claim against the State of Texas, known as the "Mercer Colony" claim, may realize.

And George W. Paschal, junior, and Edward D. L. Wickes, on their part, bind themselves to render all the assistance in their power to insure the ultimate success of the claim.

Signed in triplicate at Austin, this twenty-ninth day of January, 1873.

GEO. HANCOCK,
President of Mercer's Texas Land Co.
GEO. W. PASCHAL, JR.
E. D. L. WICKES.

191 And complainant also produced and read upon the hearing the following certificate of the Commissioner of the General Land Office:

GENERAL LAND OFFICE,
Austin, Texas.

I, Jacob Kuechler, Comm'r of the Gen'l Land Office, hereby certify that there is no evidence in this office that Charles Fenton Mercer and associates, who entered into a colonization contract with Sam Houston, President of the Republic of Texas, on the 16th of January, 1843, have ever received any land granted them by the Government of the Republic and State of Texas by virtue of, or in consequence of, said colonization contract.

In testimony whereof, I hereunto set my hand and affix the impress of the seal of my office, this tenth day of February, A. D. 1873.

[L. S.] JACOB KUECHLER,
Comm'r.

And complainant also produced and read upon the hearing
192 the following letter of Thos. H. Duval, dated Austin, February 22d, 1854:

AUSTIN, February 22d, 1854.

DEAR BIRCHETT: Your letters of the 19th and 30th ult. were duly received. In the latter you advise me of the payment by you of Mr. Hancock's draft for $300. Your letter of same date, addressed to Mr. H., to my care, was taken by me out of the post-office, he having left only a day or two before. I have this day enclosed it to him, with one from myself, directed to Louisville, Kentucky, in the neighborhood of which place he resides.

Mr. Hancock's application to the Legislature, made on behalf of himself and the other members of the "Texas Association," just and reasonable as it was, failed from a want of time and the prejudice which existed on the part of certain narrow-minded men in the Senate. To these causes must be added the bad faith on the part of some Senators who promised to support the bill, but "flew the track" when their votes were needed.

My brother-in-law, Geo. W. Paschal, and myself, prosecuted the claim for Mr. Hancock. We only asked that the Texas Association might be permitted to sue the State, in her own court, and if they could succeed in establishing their right to any lands, under their
193 contract and the laws of the land, that land certificates might be issued to them for the amount, subject to be located upon any of the vacant and public domain of the State. This was the substance of the bill drawn up by us, and reported favorably on by a large majority of the Judiciary Committee in the Senate, to whom it was referred. We did not seek to interfere with the rights of the colonists, or the lands they had acquired from the State. This was expressly avoided by the terms of the bill, as a large majority of the committee, composed of the most intelligent lawyers in the Senate, reported favorably on the bill and recommended its passage. I had

scarcely a doubt but what it would go through. My belief in this was strengthened by conversing on the subject with the Senators generally. The only opposition I expected was from a man named Martin, who represented the colonists, and some three or four others equally as prejudiced against Mercer and his associates. As the session was near its close, and Mr. Hancock was very impatient to have the question tested, it was brought up before many of the Senators, understood properly the nature of the claim, the grounds upon which it was based, the object of the proposed suit, &c. When the vote was taken for the engrossment of the bill, only nine voted for it, while 16 voted against it. The session was so near its close that nothing further was attempted.

At our advice and others of his friends here, Mr. Hancock immediately announced his intention of bringing suit in the U. S. Dist. Ct. against the colonists. This suit we shall bring in a short
194 time. Its effect will certainly be to alarm the colonists greatly, and with good reason; they will be clamorous for the Legislature to settle the claims of Gen'l Mercer and his associates and thus relieve them and their lands from the dangers of a lawsuit in a court of the U. States—a tribunal of which the people of this country have a great dread. They will take care that those who represent them in the next Legislature shall not stand in the way of a compromise between the contractors and the State. It was alone the opposition which originated from this source that defeated the measure at the recent session. A suit will not only neutralize this, but you will find that the men who will be most active at the next session in getting an act passed to satisfy the claims of Mercer and his associates, will be those who represent the colonists.

The judgment by default rendered in the District Court of Navarro county in 1848, against Mercer and his associates, will be no bar to the suit we intend to bring against the colonists. That judgment was and is an absolute nullity for several reasons. One is that Mercer's associates had no notice of the institution of the suit—their names were not included in the citation which was made by publication. Another is that the suit was brought in the name of the Governor of the State, when our Supreme Court has decided that this will not do, but that every suit in behalf of the State must be brought in the name of "the State," &c. Indeed this is clearly required by a section of our State Constitution. I feel confident that at the next session of the Legislature they will be glad to compromise by giving the association four or five hundred sections of land. So you must keep in good spirits. Our ultimate success is certain. Let Bemis know what I have written concerning this matter.

Yours very truly, THOS. H. DUVAL.

195 And complainant also produced and read upon the hearing the following receipt of Allen & Hale:

GALVESTON, Feb. 11, 1855.

Received of George Hancock, Esq., acting on behalf of the stockholders of Mercer Colony, one hundred dollars, part of a retaining fee of five hundred dollars, to be paid to us for the said stockholders, for professional services to be rendered to them in endeavoring to establish their title and effect a settlement of their claims to lands within the said colony.

ALLEN & HALE.
By W. G. HALE.

And complainant also produced and read upon the hearing the following paper:

I hereby certify, at the request of Thomas Hayward, Esq., of Tallahassee, in the State of Florida, that his deceased son, Robert Hayward, had at the time of his death and prior to my transfer to Col. George Hancock, of Kentucky, of all my interest in the grant hereafter mentioned, paid me in full for his share of stock held in the company I formed for the colonization of part of the territory of the then independent Republic of Texas, being six thousand square miles of the said territory, for that purpose, in 1843, by Sam Houston,
President of the said Republic, by indenture attested by the
196 Secretary of State thereof.

C. F. MERCER.

Tallahassee, Fla., May 19th, 1859.

And complainant also produced and read on the hearing the following:

AUSTIN, TEXAS, 14 June, 1854.

COL. GEO. HANCOCK, Louisville, Ky.

DEAR SIR: We have been expecting for some time to hear from you in regard to the Mercer Colony matter. We have not yet filed a bill against any of the colonists, though we are prepared to do so. We confess there are some difficulties in the way. The late act of Congress gives a tax fee to the prevailing lawyer of $20. Should we, therefore, commence a suit against a great number of defendants and fail, the cost would be heavy, as each defendant's counsel would be entitled to a $20 tax fee. Again, as to costs. Our clerk understands the instructions of the Treasury Department to require costs to be paid as they are incurred.

There would, therefore, have to be a deposit of costs. I
197 think that in the memorandum which the writer gave you at
Galveston, you were instructed to furnish us the names of all the parties at interest as well as the joint stock covenant; in other words, all the papers constituting their right. You said something about intending to correspond with the other parties and to address us.

As the object of our bill will to establish the principle of the implied trust, and for the *moral* effect before the legislature, it will not

be well to make too many defendants. We must not delay too long a time, or our bill will be subject to the charge of being stale.

At the same time we find it necessary to ask you who are to be the parties, and to advise you that there will have to be a deposit of costs. We presume that by the time this reaches you there will have been answers received by you from the stockholders. We are ready to proceed as you shall advise. As to giving up the claim, we never intend that.

We remain respectfully, &c.,
PASCHAL & DUVAL,
By G. W. P.

198 And complainant also produced and read upon the hearing the following report of certificates issued by J. M. Crockett, Com'r, to the citizens of Mercer's Colony:

Record of certificates issued to the citizens of Mercer's Colony, concluded 30th September, 1851, by J. M. Crockett, Commissioner.

No. Certs.	Names of Grantees.	Acres.
1	William C. Reeves	320
2	Jeremiah Merryman	640
3	Fincher Jones	640
4	John P. Lawrence	640
5	Henry K. Valentine	640
6	Adam C. Haught	640
7	Robert K. Briscoe	320
8	Thomas Briscoe	640
9	Garkin W. Briscoe	320
10	John Scott	320
11	John O. Heath	640
12	James Kyser	640
13	Thomas Butler	640
14	Archibald Hanna	640
15	John Butter	320
16	John W. F. Stone	640
17	Heirs of Charles W. Jones	320
18	John M. Harding	640
19	Archibald M. Donnell	640
20	Wiley D. Weaver	640
199 21	Thomas Grumley	640
22	Jeremiah H. Holford	640
23	James Loving	320
24	Samuel Andrews	320
25	Henry D. Banks	320
26	Reuben W. Rowe	3 0
27	William Rowe	640
28	John M. Thomas	320
29	Thomas Horn	640

	No. Certs.	Names of Grantees.	Acres.
	30	Jesse S. Stackey	320
	31	Albert More	640
	32	James R. Brenton	640
	33	Charles D. Morrill	640
	34	James More	320
	35	Isaac Edwards	640
	36	John Edwards	320
	37	William Parker	640
	38	Jacob C. Hall	640
	909	Thomas D. Coats	640
	910	Samuel Coats	640
	911	Charles H. Barker	640
	912	Norman H. Whittenberg	640
	914	Mary Ann Freeman	640
	915	James M. Bennett	640
	916	David P. Feares	320
	917	Benjamin Beckun	640
	918	Oliver V. Ledbetter	640
	919	Samuel A. Haught	640
	620	William H. Rowe	320
	921	Thomas Dean	640
200	922	John Larnier	640
	1130	John W. Cadwell	640
	1131	John L. M. Baker	640
	1132	Luther D. Green	320
	1133	Heirs of Willis Green	640
	1134	John M. Rowe	320
	1165	Henry H. Hall	320
	1166	Archibald B. Garnier	320
	1167	Charles Neeley	640
	1168	Bates O. C. Prunds	640
	1169	John Heath	640
	1190	Orsa Shelby	640
	1191	Merar Philan	640
	1192	Joshua H. Gough	320
	1193	Horan H. Dearman	320
	1194	Elisha S. Wyman	640
	1195	Joseph N. Whittensberg	320
	1196	Heirs Thomas B. Mays	640
	1239	Robert Shaw	640
	1240	Richard Dickens	640
	1241	Heirs John A. Shelby	640
	1242	William L. Mitchell	640
	1243	Joel D. Mitchell	320
	1244	Thomas W. Gore	640
	1245	John A. Foreman	320
	1246	John Beaty	320
	1260	George Reves	640

	No. Certs.	Names of Grantees.	Acres.
	1261	Green M. Donald	640
	1262	Heirs of J. A. Robeson	640
	39	Napoleon B. Brooks	39
201	40	Peter Epperson	640
	41	James P. Apperson	320
	42	James Jackson	640
	43	Michael T. Flaherty	640
	44	Wilie B. M. Nicholson	640
	45	Wesley Young	640
	46	Heirs of Henry Young	640
	47	Heirs of John B. Edwards	640
	48	William Young	640
	49	William Smith	320
	1052	Isaac B. Sessions	640
	1053	William R. Herron	320
	1062	William Hogan	640
	1063	Thomas Herron	320
	1064	John J. Maxwell	640
	1237	Henry T. Harlos	640
	1238	Jessee L. Herring	640
	50	Thomas W. Williams	320
	51	Jeremiah Milton	640
	52	Grisham Free	640
	53	Lilburn K. Lee	640
	54	William C. Crabtree	640
	55	Benjamin January	640
	56	Augustus Barry	640
	57	William Ornal	640
	58	John G. Boils	320
	59	John H. Waddle	320
	60	Brinson M. Bryan	320
	61	Hiram M. Estes	320
	62	Hiram Estes	640
202	63	Heirs of Joseph H. Reed	640
	64	Abner Lee	320
	65	James George	640
	66	Perley I. George	320
	67	Henry B. George	320
	68	Samuel R. Gibbs	320
	69	Trial E. Jackson	640
	70	Aaron Estes	640
	71	George H. Estes	320
	72	Thomas J. Tuney	640
	73	William Cook	320
	74	Heirs Jeremiah V. Sweney	640
	75	Heirs John T. Houston	640
	76	Heirs Samuel Waddle	640
	77	Philip S. George	320

	No. Certs.	Names of Grantees.	Acres.
	78	James S. George	320
	79	Andrew J. Parker	320
	80	Joseph L. French	640
	81	Jacob Richardson	640
	82	Israel D. Houston	320
	83	Joshua Oustot	640
	84	David Oustot	640
	85	Frederick W. Williams	640
	86	Warren Sedwell	640
	87	Harris F. Treadwell	320
	88	Lodrick L. Williams	320
	89	Thomas Williams	640
	90	William Rickey	640
	91	James Hooper	320
	92	Heirs William H. Williams	320
203	93	Jonathan Newby	640
	94	John R. Lansford	640
	95	John Davenport	320
	96	Jacob Hartzel	640
	97	Daniel Boils	640
	98	Moses M. Hughs	640
	99	James Bundy	640
	100	John More	640
	101	William H. Bundy	320
	102	William D. Johnson	640
	103	William Sims	320
	104	William Dalton	640
	105	William Wills	640
	106	Green L. Smith	640
	107	William N. Anderson	640
	108	Montravel Fonthy	320
	109	Heirs Sanders Elliott	640
	110	Jacob Elliott	640
	111	Pleasant Watkins	320
	112	Moses Meazel	320
	113	Heirs of Wm. Watkins	640
	114	Jackson Blevins	640
	115	Jackson Harris	640
	116	William Paris	640
	117	Echols G. Shults	640
	118	Fielding L. Kirtley	640
	119	Jacob Meek, Sr.	640
	120	Robert B. Ray	320
	121	Josiah Watkins	640
	122	Wryer Price	640
	123	Radford Ellis	640
204	124	Thomas Crabb	640
	125	James Haggard	640

	No. Certs.	Names of Grantees.	Acres.
	126	Hickman M. Shults	640
	127	William H. Baman	640
	128	Simon Meek	640
	129	Wm. Cox	640
	130	Lorenzo Don Meek	640
	131	John W. Meek	640
	132	James Fletcher	640
	133	Jacob Meek, Jr.	320
	134	William Haggard	640
	135	George W. Meek	640
	136	Robert N. White	640
	137	Heirs of Martin Shults	640
	138	Frederick S. Williams	640
	139	William Hamilton	640
	140	Richard Goad	320
	141	Heirs Henry Lee	640
	142	James J. Williams	320
	143	James Hamilton	640
	144	Edward M. Mattock	320
	145	Alfred Lee	640
	146	James D. Petty	640
	147	John Lee	640
	148	John Hilburn	640
	149	Wesley Philipps	320
	150	Nathan H. Hobbs	640
	151	Joseph Burrows	640
	152	Joseph Barber	640
	153	William Roberts	640
205	154	John Richardson	640
	155	Eppihraim McDaniel	320
	156	John P. McDaniel	320
	157	John Hilburn	320
	158	James C. Hilburn	320
	159	Jonathan Richardson	320
	160	Jubilee McKinney	320
	161	Elias Carroll, Jr.	320
	162	Elias Carroll, Sr.	640
	163	Martin Caddell	640
	164	Lewis Caddell	320
	165	John P. Brown	320
	166	John Rains	640
	167	Hiram P. Morrell	320
	168	John Hamilton	640
	169	Claiburn Harris	320
	170	William H. Morrell	320
	171	William M. Harris	320
	172	John B. Harris	320
	173	Napoleon H. Harris	320

	No. Certs.	Names of Grantees.	Acres.
	174	William B. McCabe	640
	175	William Ward	640
	176	Benjamin Roberts	640
	177	Thomas Bell	320
	178	Joseph Beatty	640
	179	Evans Roberts	320
	180	John Ward	320
	181	Thomas R. Donaghe	320
	182	Heirs of Philip Highnote	640
	183	Noble Wade	640
206	184	Williamson H. Bendy	640
	185	Marshall Wantland	640
	186	John Collins	320
	187	Samuel A. Ross	640
	188	Edwin Garlick	320
	189	David D. Anderson	640
	190	Obediah I. Meador	320
	191	William Bright	640
	192	Daniel Caldwell	640
	193	John C. Caldwell	320
	194	Elijah Jeffers	640
	195	Isaac P. Jeffers	640
	196	Stephen D. Bright	320
	197	Jeremiah Crabb	640
	198	William Meador	640
	199	Elijah P. Baker	640
	200	John M. Bright	320
	201	James Reagan	640
	202	George V. Petty	640
	203	Robert B. Donaghe	320
	204	William G. Donaghe	640
	205	Jesse C. Rolin	640
	206	Frederick Seabert	320
	207	Jesse J. Mays	320
	208	Robert N. Walker	640
	209	William A. Brown	640
	210	Esau A. Jackson	640
	211	Thomas M. Anderson	320
	212	Thomas W. Meador	320
	213	George W. Bragg	640
207	214	Florinda Dixon	320
	215	William Dixon	640
	216	John T. Petty	320
	217	James N. Duncan	640
	218	Joseph Bagg	940
	219	Thomas O. Jones	640
	220	Heirs Richmond Haggard	640
	221	Asa Chambers	640

	No. Certs.	Names of Grantees.	Acres.
	222	James H. Chambers	320
	223	Heirs Wm. E. Chambers	320
	223	Nancy Bragg	320
	224	Elizabeth Hamilton	640
	225	Heirs William Jeffers	640
	226	John C. Jeffers	320
	227	Reuben Jones	320
	228	Luke Choate	320
	229	Elijah Sanders	320
	230	Richard C. Donaldson	320
	231	Richard Sanders	320
	232	Thomas E. Sloan	640
	233	Heirs Martha Boyd	640
	234	Quinton N. Anderson	640
	235	Archibald M. Sloan	320
	236	Rice V. Morrell	640
	237	George M. Hogan	640
	238	James H. Highnote	320
	239	James M. Gloston	640
	240	John M. Morrell	640
	241	Lucien L. Burtlet	320
	242	James A. Johnson	640
208	243	Moses Johnston	320
	244	William I. Jeffers	320
	245	Stephen Richardson	640
	246	Heirs of John C. Dodds	640
	247	Sterling C. Cross	640
	248	Harvey W. Young	320
	249	Henry Young	320
	250	Adam Hulon	320
	251	Joshua W. Brock	640
	252	Armsted Blevins	640
	253	Lafayette Brock	320
	254	James C. Jones	640
	255	Clayton C. Harris	640
	256	Philip I. Burrow	640
	257	William H. Burrow	640
	258	Jefferson McKinney	640
	259	Lewis Martin	320
	260	William I. Dabury	320
	261	Thomas Bragg	640
	262	Benjamin Bragg	320
	263	William Fletcher	320
	264	William Spurlin	640
	265	Lewis Godard	640
	266	William P. Wood	320
	267	Heirs Lazarus C. Spurlin	320
	268	Heirs Wm. Az. Jerh. D. Spurlin	630

	No. Certs.	Names of Grantees.	Acres.
	269	Joshua S. Hanley	640
	271	Christian C. Fisher	320
	272	Sanuba H. Fisher	640
	273	Heirs William Barnett	640
	274	Heirs Eli M. Corgien	640
209	275	William R. Alegre	640
	276	Anderson Nicks	640
	277	Anderson T. Nicks	640
	278	Heirs of Noah Kizziah	640
	279	Thomas Smith	640
	280	John O. Smith	320
	281	Henry Brown	640
	282	Mathias Parsons	320
	283	Reuben Givinn	640
	284	Alfred Bragg	320
	285	Dinah Clark	640
	286	George H. Fain	640
	287	Benjamin S. Coachman	640
	288	Robert D. Sloan	320
	289	Nathan Powell	640
	290	Heirs Nathan Parsons	640
	291	George Norvall	640
	292	Thomas S. Norvell	320
	293	Benjamin Norvell	320
	294	Robert F. Norvell	320
	295	Arthur Renshaw	640
	296	Benjamin F. Wilson	320
	297	George W. Crockett	320
	298	James T. Lee	320
	299	Heirs William Dixon	640
	300	John A. Harlan	640
	301	Samuel Wilson	640
	302	Thomas Wilson	320
	303	William M. McKinney	320
	304	Lot Wilson	320
210	305	Hampton McKinney	640
	306	Fenwick R. Kendall	640
	307	George Young	640
	308	Benjamin F. Browning	320
	309	Heirs of John Cuper	640
	310	Heirs James C. Blankenship	640
	311	Heirs Randel Sanders	640
	312	Alexander Black	320
	313	Richard S. Sate	320
	314	Charles Oneal	320
	315	John G. Ray	320
	316	Thomas H. McKinney	320
	317	John H. Randle	640

	No. Certs.	Names of Grantees.	Acres.
	318	Heirs David Mize	640
	319	Isaac P. Morgan	320
	320	Hubbard P. Walker	640
	321	Andrew E. Williams	640
	322	Joshua I. B. Hervey	320
	323	James D. Scott	320
	324	Thomas I. White	640
	325	John B. White	640
	326	Elmira Evans	640
	327	George W. Bedlin	320
	328	Maatha Matthews	640
	329	Heirs James E. Matthews	320
	330	John H. Matthews	320
	331	Newton W. Matthews	320
	332	John W. Owen	320
	333	James T. Caddell	640
211	334	Ancel C. Newton	640
	335	Stephen Hampton	640
	336	Robert R. Jackson	640
	993	John N. Claypool	640
	994	Stephen I. Claypool	640
	995	Robert C. Epps	640
	996	Roderick Oliver	640
	997	Isaac Malon	640
	998	Thomas Malon	640
	999	Daniel Potter	640
	1000	John S. Claypool	640
	1001	Thomas S. Harper	640
	1002	Noble G. M. Anderson	320
	1003	Franklin Oliver	320
	1004	William W. Oliver	320
	1005	Micajah Bateman	640
	1006	William Malon	320
	1007	Heirs Archibald Hanna	320
	1008	Reuben B. Vest	640
	1009	William J. Harris	640
	1010	John H. Bean	640
	1011	William Fisher	640
	1012	Thomas B. Miller	640
	1013	James Dunn	640
	1014	Charles G. Dunagin	640
	1015	Calvin C. Pearson	320
	1016	Edward W. Brown	320
	1017	Littleton Loggins	640
	1018	William Bankhead	640
	1019	John Blevins	320
212	1020	Heirs George W. Bankhead	640
	1021	William Caddell	640

	No. Certs.	Names of Grantees.	Acres.
	1022	Ruth McFadding	320
	1023	Joseph Carrol	640
	1024	John M. Sloan	320
	1025	David Sloan	320
	1026	Asa Howall	640
	1027	Philip F. McCabe	640
	1028	John W. Baily	320
	1029	Anderson Phifer	320
	1030	Edwin Finch	640
	1031	David J. Johnston	320
	1032	Owen Humphrey	640
	1033	Benjamin F. Humphrey	320
	1034	James B. Barry	640
	1035	William C. Matteck	320
	1036	John O. McKinney	320
	1036	Marida Price	320
	1038	William W. Frost	640
	1039	George W. Brewer	320
	1040	James R. Yource	640
	1041	Seth W. Taylor	640
	1042	William Burns	320
	1043	Augustus F. Foreman	320
	1044	Henry Bridon	320
	1045	Brooks W. Lee	320
	1046	Wilson I. Hutchinson	320
	1047	Jacob I. Wright	320
213	1048	James Cook	320
	1049	John Parks	320
	1050	Ephraim Lee	640
	1051	Heirs Edward Hampton	640
	1143	John M. Campbell	640
	1144	Daniel M. Hamilton	640
	1445	William I. Stokes	320
	1146	Heirs Allen M. Moore	320
	1147	Mary Ann Tatt	640
	1148	William B. Nettles	640
	1149	Moses W. Burleson	640
	1150	James Hicks	320
	1151	Anthony P. Merryman	640
	1152	William Langford	640
	1153	Berry Langford	640
	1154	John Langford	320
	1155	David B. Mitchell	640
	1156	Hervey Garlick	320
	1157	John B. Sanders	320
	1158	Noah M. Flint	320
	1159	Isaac Clem	320
	1160	John Payne	320

	No. Certs.	Names of Grantees.	Acres.
	1161	John Carr	640
	1220	Calvin Cadwell	320
	1221	Eleazer Nash	640
	1222	John T. Curry	320
	1223	Alexander M. Dann	320
	1224	George Haynie	640
	1225	Enoch Sevier	640
	1226	Daniel Harlas	320
214	1127	Joseph A. Loove	320
	1228	Benjamin S. Mayfield	320
	1229	Heirs Ury Dearman	640
	1230	Isaac Kellian	640
	1231	Caswell Rushian	320
	1232	John U. Loove	320
	1233	Benjamin Sanders	320
	1234	Jesse A. Hanley	320
	1235	William Joice	320
	1236	Joshua Sanders	320
	1170	Daniel W. Kinson	320
	1171	Permelia Session	640
	1172	Mary A. McNeill	640
	1173	Duncan McNeill	320
	1174	William McNeill	320
	1175	Hector McNeill	320
	1176	Heirs Catherine McMillans	640
	337	Elijah F. Sumsdown	320
	338	Washington Meredith	640
	339	Richard Reed	640
	340	William F. Meredith	640
	341	Humphrey L. Gilmore	640
	342	William R. Rushing	640
	343	James H. Rushing	640
	344	Samuel C. Gibson	640
	345	Alfred Enes	640
	346	William Meredith	640
	347	James Ducan	640
	448	Philip I. Burford	640
	349	Mordicai C. Howard	320
215	350	Edmond Guthrie	640
	352	William K. Newell	640
	351	Andrew I. Allen	640
	353	Thomas H. Magness	640
	354	Green B. Sanders	640
	355	Elizabeth Sanders	320
	356	Claiburn W. Allen	320
	357	Epraim W. Guthrie	640
	358	James I. Rayel	320
	359	Johnston Dalton	320

No. Certs.		Names of Grantees.	Acres.
	360	Charles R. Sanders	320
	361	James Boggs	320
	362	Nathaniel T. Dickson	640
	363	Redley B. Thomas	640
	364	John Dureye	640
	365	John Davenport, Sr.	640
	366	Jonas Williams	640
	367	William Williams	320
	368	Lewis Netherlin	320
	369	James B. Davenport	640
	370	Bluford Shankle	640
	371	Stephen H. Hampton	320
	372	Hiram S. Allen	640
	373	David Morgan	640
	374	Andrew F. McCarty	640
	375	Nancy Lovel	640
	376	Jonas De Amon	320
	377	Daniel Rose	640
	378	James R. De Armon	320
	379	Jonathan De Armon	320
216	380	James De Armon	640
	381	John King	640
	382	William Deatherage	320
	383	Heirs William G. Dearman	320
	384	H'rs Ury De Armon	320
	385	Joseph Bartlett	640
	386	Amanda M. Carroll	640
	387	Joshua Bartlett	320
	388	John R. Bartlett	320
	389	David Baugh	640
	390	Thomas Mills	640
	391	Hugh T. Moore	640
	392	Julius Barker	640
	393	Reuben Deneye	640
	394	Elizabeth Holland	640
	395	Etheland I. Thomson	320
	396	William W. Stirman	640
	397	Joseph M. Stirman	640
	398	Joshua B. Luker	320
	399	John P. Thomson	640
	400	Thomas W. Thomson	320
	401	Vincent F. Holland	320
	402	Waterberry Scott	320
	403	George Clark	640
	404	John A. Clark	320
	405	John H. Kesser	640
	406	William C. Holland	320
	407	John P. Holland	320

	No. Certs.	Names of Grantees.	Acres.
	408	James Stephison	320
	409	Wiley Jones	640
217	410	Heirs of Jourdan Jones	640
	411	Jonathan Holeman	320
	412	John Anderson	320
	413	William White	640
	414	Joseph Shelton	640
	415	James A. Mitcham	640
	416	Fleming Ball	640
	417	Hezekiah Mitcham	640
	418	Joseph J. Shelton	320
	419	George I. Mitcham	320
	420	James Perkins	640
	421	James Ball	640
	423	Horatio A. Parson	320
	424	James Smith	640
	425	Heirs Charles R. Sanders	640
	426	William Baker	640
	427	Lewis Baker	320
	428	William Waldress	640
	429	William Daniel	640
	430	Gray B. Francher	640
	431	Asa Dalton	640
	432	William Francher	640
	433	James C. Francher	640
	434	John F. Watkins	640
	435	Alexander Francher	320
	436	Samuel Whitehead	640
	437	Davis Blocker	640
	438	Edmond B. Reynolds	320
	439	John Walker	640
	440	Jessee A. Asberry	640
218	441	Abraham Redlin	640
	442	Rolen Boles	640
	443	Wesley Boles	320
	444	Marion Boles	320
	445	John Williams	640
	446	Thomas L. Williams	640
	447	Barksdale W. Wade	320
	448	John S. Damron	640
	449	Nicholas H. Gray	640
	450	John R. Sheltman	320
	451	Henry F. Welson	640
	452	Smith Gibbs	640
	453	Daniel Phillips	320
	454	George N. Sawyer	640
	455	George Sawyer	640
	456	Perry S. Owen	320

	No. Certs.	Names of Grantees.	Acres.
	457	Leander I. Ridlin	640
	458	Ambrose M. Welson	320
	459	William Daugherty	320
	460	James Holt	640
	461	George W. Damron	320
	462	Isaac C. Holt	320
	463	Oley W. Owen	640
	464	John F. Carter	640
	465	John H. Owen	320
	466	Jessee H. Walton	640
	467	Jessee M. Suton	640
	468	George W. Brack	640
	469	Dennis Thetford	640
	470	Robert G. Thetford	320
219	471	George Seitz	640
	472	John R. Shultz	320
	473	Silvester G. Parson	640
	474	Nathaniel Daugherty	640
	475	Daniel H. Parson	320
	476	James E. Teel	640
	477	John Damron	640
	478	Jacob G. Shotman	640
	479	Samuel E. Peel	320
	480	Anna G. Stockton	640
	481	Elsy Stockton	320
	482	Reuben Nipp	640
	483	James Daugherty	320
	484	Absalom M. Cobb	640
	485	Samuel Woolridge	320
	486	Peter A. Smith	640
	487	Heirs Vincent A. Wade	640
	488	Heirs Alexander P. Scott	640
	489	Andrew A. Loove	320
	490	Enock C. Tinnin	320
	491	William H. Carter	320
	492	Michael I. Carter	320
	493	David W. Owen	320
	494	Silas Howard	320
	495	William L. Wade	320
	496	Calvin B. Owen	320
	497	William C. Howard	320
	498	Jacob Calderon	640
	499	Thomas Seitz	640
	500	Andrew J. Seitz	320
220	501	Benjamin O. Swearinger	320
	502	Thomas Sewell	640
	503	Thomas I. Sewell	320
	504	James M. Sewell	320

	No. Certs.	Names of Grantees.	Acres.
	505	Thomas Ritter	640
	506	George W. Mitchell	640
	507	John I. Beck	640
	508	Jasper D. Weaver	640
	509	James M. Carter	640
	510	Victor Pannell	640
	511	Henry Yorkerbriekle	320
	512	Archibald McDonald	320
	513	Stephen O. Gibbs	640
	514	James W. W. Gibbs	320
	515	Malcolm McDonald	640
	516	Bledsoe Butter	640
	517	Thomas Reeves	640
	518	George W. Lovel	640
	519	Littleberry L. Harrison	640
	520	James Flinn	320
	521	Addison N. Weaver	320
	522	Preston Hartgraves	640
	523	Casper Weaver	640
	524	Charlton Howard	640
	525	John Lockhart	640
	526	David Robertson	640
	527	Maddason I. Robertson	640
	528	Moses Jones	640
	529	James Gray	640
	530	Jefferson McEntarff	320
221	531	Samuel Jones	320
	532	Robert B. Scott	320
	533	Walter C. Scott	320
	534	John W. Scott	320
	536	David F. Williams	640
	537	Heirs John L. McDonald	640
	971	William Gilliland	640
	972	William R. Flowers	640
	973	James C. Gilliland	320
	974	Thomas Helms	640
	975	Jacob Huffer	320
	976	Clemmun Lindberg	640
	977	John B. Gilliland	320
	978	Samuel Morrison	640
	979	Recina Ann Clark	640
	980	Lorenzo D. Stover	640
	981	Robert H. Pierson	640
	982	William S. Helms	640
	983	Heirs Perry A. Arrant	640
	984	Sarah Finch	640
	985	William Beaver	320
	986	Miles D. Blue	640

	No. Certs.	Names of Grantees.	Acres.
	987	William C. Bobo	640
	988	Oliver Scott	320
	989	Jonathan Jones	640
	990	Jacob Sutton	640
	991	Joseph S. Stephens	320
	992	Heirs Sicil Bobo	640
	1177	Heirs Levi Antle	640
	1197	John W. Hughes	640
222	1198	Joshua McBride	320
	1199	John P. Ingraham	320
	1200	John G. Ratliff	640
	1201	Mary Ann Rice	640
	1202	Watson Collins	640
	1203	Joab McMannus	640
	538	William Love	640
	539	Heirs Robert H. Love	640
	541	James W. Love	320
	542	Mills Goodwin	640
	543	Samuel M. Harrison	640
	544	James Hooper	640
	545	James M. Harrison	640
	546	Thomas Hooper	320
	547	Elizabeth McEnturff	640
	548	Morin Moore	320
	549	Allen Blair	640
	550	James D. Wright	640
	551	David I. Bandy	320
	552	Joseph M. James	320
	553	John A. James	320
	554	Jones L. Robbinett	320
	555	William James	640
	556	Heirs John Degman	640
	257	Daniel A. Lewis	640
	558	William Mastons	640
	559	William Warenshold	640
	360	John H. Stark	320
	561	Christy P. Parker	320
	462	John Montgomery	640
223	563	Daniel Henley	640
	564	James C. McUlmury	320
	565	Ephraim D. Lux, jr	640
	566	William E. H. Jones	320
	567	Heirs Elbert A. Ferguson	640
	568	James W. M. Dalton	640
	569	Jeremiah Sherwood	640
	570	David Harr	640
	571	John R. Johnston	320
	572	Jonathan E. Sherwood	320

	No. Certs.	Names of Grantees.	Acres.
	573	John A. Wilson	640
	574	Richard R. Jones	640
	575	John R. Hurst	640
	576	Andrew H. Henry	640
	577	Grintin A. Finley	640
	578	Rhodes S. Wilson	640
	579	Hardy Woodhouse	640
	580	Henry Scroggin	640
	581	Demsey Fuller	640
	582	Daniel W. Scroggin	320
	583	Andrew I. Beck	320
	584	Henry Fuller	320
	585	John G. Long	320
	586	George N. Rader	320
	587	William H. Beck	320
	588	Andrew P. Sullivan	640
	589	James A. Jones	640
	590	Isaac F. Hooser	640
	591	John R. Rierson	640
	592	Grandberry R. Mason	640
224	593	Wm. Carroll F. Hooser	320
	594	Anderson V. Hooser	320
	595	Samuel Newell	640
	596	James C. Newell, jr	320
	597	James C. Newell, sr	640
	598	George L. Hurst	320
	599	James Thweatt	640
	600	William B. Clardy	320
	601	Goodman Deweese	640
	602	Joseph M. H. Chisholm	320
	603	John W. Fields	326
	604	Heirs Samuel Eliot	640
	605	John W. White	320
	606	Wyatt Parham	320
	607	Ebenezer M. Eliot	320
	608	John W. Eliot	320
	609	Willis Steele	640
	610	Andrew Norton	640
	611	Robert Godfrey	640
	612	George R. Paschal	640
	613	Felix W. Bridges	640
	614	Silas Estes	320
	615	Walter Ferrell	640
	616	Alexander W. White	640
	617	John P. Newton	640
	618	Heirs John Estes	320
	619	Heirs Wm. L. Estes	320
	620	John Pierce	640

	No. Certs.	Names of Grantees.	Acres.
	621	Daniel P. Cunningham	320
	622	Thomas Cunningham	640
225	623	James Bartley	320
	624	Calamers Beckett	640
	625	Andegrose Cunningham	320
	626	Ruth Cunningham	640
	627	Peter I. Irvine	320
	628	James T. Bundy	320
	628	Heirs George W. Keen	320
	629	Justus D. Price	640
	630	Enoch R. M. Bouton	640
	631	Henry Ratts	320
	632	Nancy Fuller	640
	633	Nancy McCasland	640
	634	Heirs Henry K. Newell	640
	635	Andrew I. McCasland	640
	636	William C. Hall	640
	637	Edward Spear	640
	638	John Capeland	640
	874	Glover Wells	640
	875	Reuben Wells	320
	876	Neely M. Ballard	320
	877	James Smith	640
	878	Heirs Reuben H. Smith	320
	879	Samuel S. McCurry	640
	880	Ephraim Goss	640
	881	P. Bruce Harrison	320
	882	Benjamin F. Boydston	640
	883	Cary Cobb	640
	884	William H. Barns	320
	885	Sterling R. Barns	640
	886	James Thompson	640
	887	Nathan Butler	640
226	888	John H. B. Jones	640
	889	Reuben Ballard	640
	890	Watson B. Bowles	320
	891	John Farmer	320
	892	Samuel King	640
	893	Moses Simmons	640
	894	William G. Duvas	640
	895	John M. Gass	640
	896	Robert Simmons	320
	897	Heirs Henry H. Turner	640
	898	Heirs William Briscor	640
	899	Isaac Briscor	640
	900	Isaac Jones	640
	901	John Simmons	640
	902	Wiley B. Green	640

	No. Certs.	Names of Grantees.	Acres.
	903	David C. Farmer	320
	904	Wiley B. Farmer	320
	905	Marcus C. Duypuy	640
	906	James R. Briscor	640
	907	John R. Conner	640
	908	John H. Bailey	640
	923	M. B. Jones	640
	924	Hiram E. Hayse	320
	925	John H. Bailey, Jr	320
	926	Allen Atteberry	640
	927	Elliott C. Davidson	640
	928	Joseph Atteberry	320
	1056	Aaron West	640
	1057	James B. Shelby	320
	1058	William D. Burnett	640
227	1059	Samuel B. Shelby	320
	1060	Bradley Kingsborough	640
	1061	Robert C. Montgomer	640
	1062	Henry Rampey	640
	1063	Wm. B. Kingsborough	320
	1064	Heirs John Rampey	320
	1065	Heirs Jesse Norton	320
	1066	Heirs Aaron Jones	640
	1067	William A. Allen	640
	1068	James M. Allen	320
	1069	John B. Allen	320
	1070	Joseph Anderson	320
	1071	Hartmel B. Anderson	320
	1072	Nathaniel S. Bratcher	640
	1073	William N. McBee	320
	1074	James Coggin	640
	1075	Abram Baird	640
	1076	John Williamson	640
	1077	Berry G. Thweatt	320
	1078	Shaderick Thweatt	320
	1079	Levay Williamson	320
	1080	Absalom Copeland	640
	1081	Dempsey Wood	320
	1082	William H. Baird	640
	1083	Zedehiah Tate	320
	1084	James H. Price	320
	1085	Samuel D. Woods	320
	1086	William E. Sullivan	640
	1087	Jessee Lewis	320
	1088	Alexander M. Butler	640
228	1089	John R. Coggin	320
	1090	John Spikes	640
	1091	Jackson Phillips	640

No. Certs.		Names of Grantees.	Acres.
	1092	James N. Nandain	640
	1093	Thomas M. Tribble	640
	1094	John L. Montgomery	640
	1095	Israel Spikes	320
	1096	Thomas Henson	320
	1097	James A. Nandain	320
	1098	William A. Dickerson	320
	1099	James Cargale	320
	1100	Alfred Cargale	320
	1101	William C. Mason	320
	1102	William W. Rayel	320
	1103	William H. Wilson	320
	1104	Abner Johnston	640
	1105	Andrew I. Hunter	320
	1106	Heirs Henry Hunter	640
	1107	Marcus L. Phillips	320
	1108	Levi B. Sanders	640
	1109	Jessee W. Ward	320
	1110	Phillip W. Ezell	320
	1111	Martha Love	640
	1112	Heirs Solomon Baker	320
	1135	John Loop	640
	1136	William Shelton	320
	1137	Heirs George P. Humphrey	320
	1138	Heirs Elijah R. Foster	320
	1139	Alfred Carlisle	640
	1140	Charles Carlisle	320
229	1141	Heirs David Carlisle	320
	1142	Israel Fuller	320
	1178	Anna L. Carter	640
	1179	John K. Love	320
	1207	Ephraim D. Lux, jr	640
	1208	Muscum E. Harkins	320
	1209	John D. F. McFarland	320
	1210	James M. Rush	320
	1211	William F. Mitcham	640
	1212	John Clardy	640
	1213	James A. F. McCasland	320
	1214	John L. Austin	640
	1215	Samuel W. Sholtman	320
	1216	Heirs John M. Coggin	320
	1217	Josiah M. Davenport	320
	1218	Lewis B. Wilson	320
	1219	Francis A. Tabor	640
	965	Wyatt Parham	640
	966	Robert W. Gray	640
	967	Ephraim Howard	320
	968	Obra Vanpool	320

	No. Certs.	Names of Grantees.	Acres.
	969	Andrew I. Daugherty	640
	970	John L. Seitz	320
	639	Elijah Elgan	640
	640	James C. Warren	640
	641	Wiley A. Mattox	640
	642	Benjamin F. Oldham	640
	643	Andrew McDonald	640
	644	John Granger	320
	645	Charles B. McDonald	320
230	646	Daniel F. Clendeman	640
	647	Andrew Montgomery	640
	648	Benjamin Webb	640
	649	Thomas Carter	640
	650	Jacob Webb	640
	652	David Sheppard	640
	653	Marshall Crawford	640
	654	Christopher C. Shepherd	640
	655	Heirs Wm. D. Shepherd	640
	656	William Downing	640
	657	Obediah S. Downing	640
	658	Jessee Hughs	640
	659	William D. Legatt	640
	660	Mark Rushing	640
	661	Micajah Ruder	640
	662	Joseph Fisher	640
	663	Joshua Fisher	640
	664	James A. Denson	640
	665	Hanson L. Gray	640
	666	John Ward	320
	667	Jeremiah Ward	640
	668	Isaac Wilkins	640
	669	William C. Havins	640
	670	John T. Havins	640
	671	Henry Hurley	640
	672	Andrew Hurley	640
	673	John S. Boucher	640
	674	Simon Odell	640
	675	Doctor G. Odell	320
	676	Joel Odell	640
231	677	Jesse Yarber	640
	678	Green B. Yarber	640
	679	Isaac Alexander	640
	680	Thomas R. Oxford	640
	681	Cary L. Rice	640
	682	William Rice	640
	683	William McCarrell	640
	684	Francis D. O'Kelly	640
	685	Pleasant Adams	320

	No. Certs.	Names of Grantees.	Acres.
	686	Reuben Johnston	640
	687	William R. Miller	640
	688	Andrew Essary	640
	689	Robert Montgomery	640
	690	Moses B. Bowen	640
	691	James Riggs	640
	692	Isaac Anderson	320
	693	Thomas W. Anderson	640
	694	Berry W. Anderson	640
	695	Gilbert Yarborough	640
	696	Joab D. Rains	640
	697	Lenard Brown	640
	698	Isaac Clendennen	640
	699	Isaac Sims	640
	700	John W. Foot	640
	701	Elisha Brake	640
	702	Phinihas P. Woodbury	640
	703	Richard Anderson	320
	704	Patrick Sullivan	640
	705	Hezekiah Taylor	640
	706	Russle Mabry	640
232	707	Stokely R. Cherry	640
	708	Francis M. Hase	640
	709	Harrison Thompson	320
	710	William Mabry	320
	711	Heirs Jessee Williams	640
	712	George W. Fanning	640
	713	William Fanning	640
	714	William Elain	640
	715	Money Weatherford	640
	716	George W. Brake	320
	718	Rebecca Bateman	640
	719	Margaret I. Riley	640
	720	Munny Bateman	320
	721	Elizabeth Kirkendel	640
	722	Heirs Dixon Spears	640
	723	Heirs John Weatherford	320
	724	John Williams	640
	725	Isaac Price	640
	726	Abraham Fitzgerald	640
	727	James R. Horton	640
	728	John Braziel	640
	729	John Williams	640
	730	Wm. L. Williams	640
	731	Thomas Spears	640
	732	John Spears	320
	733	Wyat Rainey	320
	734	Peter Barrow	320

	No. Certs.	Names of Grantees.	Acres.
	735	Stephen Barker	640
	736	Simson Barrow	320
	737	Samuel Denton	640
233	738	Willy Lee	640
	739	Tepton Denton	320
	740	Discon Allen	640
	741	James A. Dunn	320
	742	John Dunn	640
	743	Benjamin Anderson	640
	744	Nathan Anderson	320
	745	Archibald I. Anderson	640
	746	William H. Kuykendal	320
	747	John McBride	320
	748	Jessee M. Kuykendall	320
	749	James P. Bowerman	640
	750	Joseph Brownler	640
	751	William H. Moore	640
	752	William B. Feagan	640
	753	Sherwood McBride	640
	754	James McBride	640
	755	Drewry B. Koen	320
	756	Antony Parkham	320
	757	Sinclair Murphy	320
	758	Heirs David Koen	320
	759	James Woods	640
	760	Benjamin Watson	640
	761	Lewis W. Moore	640
	762	Hardin W. Denney	320
	763	James Lynch	640
	764	James W. Lake	320
	765	James T. Hooker	320
	766	James H. Hughs	320
	767	John H. Wallace	640
234	768	John Warren	640
	769	Samuel Ussery	640
	770	Heirs John Holt	640
	771	Jacob Holt	320
	772	Charles Williamson	640
	773	Isabella McMahan	640
	774	John R. McMahan	320
	775	John W. McMahan	640
	776	William P. Williams	640
	777	Heirs John Denton	640
	778	Joseph Roberts	640
	779	George W. Finley	640
	780	Van Lofton	640
	781	Drewry S. Warren	640
	782	Chaney B. Boren	640

No. Certs.		Names of Grantees.	Acres.
	783	John Parsons	640
	784	John Mason	640
	785	Claiborn Acres	640
	786	William I. White	320
	787	Thomas H. B. Parsons	320
	788	Ezra W. Wiley	640
	789	William Wilson	640
	790	Jackson Wilson	640
	791	Nehemiah Odell	640
	792	Thomas Lake	640
	793	Robert Harris	320
	794	John Winston	320
	795	Alanson Lake	320
	796	Jackson Weatherford	320
	797	Joseph Handlin	320
235	798	Isaac Handlin	320
	799	John R. Ruble	640
	800	Oliver H. P. Ruble	320
	801	Jacob Handlin	320
	802	David King	640
	803	Michael Milirous	640
	804	Pryar Hart	640
	805	Charles Hart	640
	806	Samuel Cooper	640
	807	Heirs John Handlin	640
	808	Charles A. Warfield	640
	809	Thomas Riley	640
	810	William Riley	640
	811	Joseph Riley	640
	812	Robert I. Clendenen	640
	813	John Odell	640
	814	Thomas Clevinger	640
	815	Turner Odell	640
	816	John Stevens	640
	817	Garrison Montgomery	320
	818	Hanna Wicker	640
	819	Priscilla Riley	640
	820	Wiley Hatcher	640
	821	Henry Riley	640
	822	Owen Riley	640
	823	Thomas H. Williams	640
	824	Heirs William Spears	320
	825	Heirs William Elam, Jr	320
	826	Eldridge B. Robertson	320
	827	Evard G. Elliff	640
236	828	Abraham Riley	640
	829	Jacob Riley	640
	830	William R. Duval	640
	831	Beauford Allen	320

No. Certs.		Names of Grantees.	Acres.
	832	Charles Alteberry	640
	833	Magirt Ivy	640
	834	Heirs Edward L. Hogan	320
	835	Milton Finley	640
	836	Abraham Watson	640
	837	Henry Watson	640
	838	Rucker Tanner	320
	839	William D. Penny	640
	840	Abraham Miller	320
	841	James Miller	320
	842	William Plaumons	640
	843	David Hall	320
	844	William Kinsey	640
	845	Heirs James Hobbs	640
	846	Heirs Joseph Boren	640
	847	Berry Reagan	320
	848	Delila Delay	640
	849	Joshua Hodges	640
	850	Denton Helmstetter	640
	851	John Finley	640
	852	Edward Finley	640
	853	John McGrew	640
	854	Jessee Finley	640
	855	Marion Finley	320
	856	Henry Delay	320
	857	Abia Lawson	640
	858	Joseph I. Finley	320
237	859	Mekings M. Knight	640
	860	Sandy R. Baely	640
	861	Edmond Finley, jr	320
	862	Robert Hodges	640
	863	William Delay	320
	864	Hiram Bowen	640
	865	William B. Hodges	320
	866	Jacob Dunn	640
	867	William Taylor	640
	868	William R. Hart	640
	869	Heirs John F. Moore	640
	870	Lafayette M. Brizendina	320
	871	Hairbird Weatherford	320
	872	Sarah Hamilton	640
	873	Thomas Strickland	640
	929	William Barker	640
	930	Nathaniel Alteberry, sr	640
	931	Elizabeth Hall, heirs	640
	932	Thomas R. Tevinson	640
	933	Balin Cain	640
	934	Stephen C. Hart	320
	935	Richmond P. Merrell	320

	No. Certs.	Names of Grantees.	Acres.
	936	Nathaniel Alteberry, jr.	320
	1180	Thomas T. Havins	640
	1181	Alexander D. Havins	320
	1182	Sarah Tanner	640
	1183	Jessee H. Tanner	320
	1184	George A. Hill	640
	1185	Charles D. Straley	320
238	1186	Benjamin Adams	320
	1187	James A. Brun	640
	1188	F. F. Green	320
	1189	William Bowen	320
	1247	Mary Robertson	640
	1248	Hugh Parsons	640
	1249	John R. Brake	320
	1250	Shadrack Dunn	320
	1251	Calvin Saylor's Heirs	320
	1252	Jessee Parsons	320
	1253	Heirs Brown C. Roberts	640
	1254	Frederick Thweatt	320
	1255	James W. Thweatt	320
	1256	Joseph Thweatt	320
	1257	Gabriel Holt	320
	1258	John Holt	320
	1259	Wiley Lewis	640
	937	Heirs Edward Mooney	640
	938	Sarah Anderson	640
	939	Mary Lee	320
	940	Rebecca Finley	320
	941	William Garrett	640
	942	Robert Lee, sr.	640
	943	John Garrett	640
	944	John Lee	640
	945	David Harris	640
	947	Robert Lee, jr.	320
	948	James Garrett	640
	949	William H. Garrett	640
	950	Thomas Proctor	640
239	951	Hiram Deaton	640
	952	John Mooney	320
	953	James Ware	320
	954	John H. Garrett	320
	955	Isaac Lee	640
	956	Franklin Marrs	640
	957	William Mooney	320
	958	Elizabeth Pautk	640
	959	William Hobbs	640
	960	Heirs Wm. Hodges	640
	961	John T. Hodges	320
	962	James Darnell	320

No. Certs.		Names of Grantees.	Acres.
	963	Sterling C. Shumate	640
	964	Heirs Russle Crawford	640
	1113	William McEnturff	640
	1114	Ambrose Fitzgerald	640
	1115	Heirs Ransom Carr	640
	1116	Heirs Samuel Fitzgerald	640
	1117	Peter Kuykendall	640
	1118	Jessee Y. Kuykendall	640
	1119	James I. Kuykendall	320
	1120	Heirs Jessee H. Kuykendall	320
	1121	Henry Creagle	640
	1122	James Danley	320
	1123	John Cohee	640
	1124	Jeremiah R. Marrs	640
	1125	Heirs Caner Lacey	640
	1126	Leonard H. Thompson	640
	1127	Jackson Freeman	320
	1128	Heirs John Shofield	640
240	1129	Morgan Carter	640
	1204	James King	640
	1205	Heirs Edward Day	640
	1206	John Norman	640
	1054	David W. Williams	640
	1055	Madison Walker	320

THE STATE OF TEXAS,
County of Travis.

I, John M. Crockett, Commissioner, of Mercer's Colony, appointed by his excellency the Governor of the State by virtue of an act of the Legislature, approved the 2nd February, 1850, do hereby certify, under my official oath, that the foregoing is a full, complete, and correct list and description of the certificates issued by me to the settlers of said colony. Given under my hand, at the city of Austin, this 11th day of December, A. D. 1851.

(Signed,) JOHN M. CROCKETT,
Com'r, Mercer's Colony.

THE STATE OF TEXAS,
General Land Office.

I, Jacob Kuechler, Commissioner of the General Land Office of the State of Texas, hereby certify that the foregoing and an-
241 nexed, on 47 pages, is a correct abstract from the record of certificates issued to the citizens of Mercer's Colony by J. M. Crockett, Commissioner, with his certificate, as the same appears at the end thereof, which record is on file in this office.

In the testimony whereof I hereunto set my hand and cause the seal of said office to be affixed, at Austin, this 27 day of January, A. D. 1873.

[L. S.] JACOB KUECHLER,
Com'r General Land Office.

And complainant also produced and read upon the hearing
242 the following:

Articles of Association.

Agreement between Charles F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association.

This agreement, made this ..... day of ....., A. D. eighteen hundred and forty ....., between Charles Fenton Mercer, of the ...., and ..... of the second part. Whereas the party of the first part has, by an agreement with the Republic of Texas, acting by Samuel Houston, President thereof, dated 29th January, 1844, obtained a grant of lands of great extent, estimated at 8,000 square miles, lying on the rivers Trinity and Brazos, in the counties of Fannin, Nachodoches and Robertson, of said Republic, and binding upon and embracing, besides the quantity above mentioned, about 2,200 square miles of certain tracts of land granted by said President Houston, on the 25th of July, 1842, to W. S. Peters and others, to which lands they have prior right, should they choose to avail themselves thereof; upon condition, nevertheless, that the party of the first part to this agreement, and such associates as he may choose, shall, within certain limited periods, introduce and settle on said lands a certain number of emigrant families, on the terms in said agreement of the 29th of January, 1844, particularly set forth; for all which particulars and all other matters pertaining thereto, reference may be had to the said agreement on file
243 in the office of the Department of State of the said Republic, and to the printed copy thereof hereto annexed; and the party of the first part to this agreement is desirous to choose the part .... of the second part to be .... of his associates, according to the terms for the said agreement, and to the extent of the interest in the same, which is herein set forth and agreed upon; such interest being designed to be a hundredth part of the whole interest of the said party of the first part in the said agreement between him and the said Republic, dated 29th January, 1844:

Now, this agreement witnesseth, That the party of the first part thereto, for and in consideration of the sum of one dollar to him in hand paid, at the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the further sum of .... to be paid in manner hereinafter provided, and of the several covenants hereinafter expressed, hath conveyed, assigned, and set over to the part ..... of the second part one hundredth of all his right, title, interest and immunities given, granted, conveyed and made over to him, the party of the first part to this agreement, by the said agreement between himself and Republic of Texas of the 29th January, 1844, and the said party of the first part hath chosen and hereby chooses the said part ..... of the second part to be ..... of his associates, for the execution of the said agreement between him and the Republic of Texas; subject,

nevertheless, to all the conditions and limitations hereinafter
244 expressed, and according to the true intent and meaning of said agreement between the party of the first part and said Republic, and of this agreement also.

The party of the first part, for himself and the associates he hath chosen or may hereafter choose, and for his and their legal representatives, covenants and agrees with the part ..... of the second part and ..... legal representatives, as follows, viz:

To apply the sum of money named as the consideration of this agreement to the objects of the agreement aforesaid, of the 29th January, 1844, between himself and the Republic of Texas, according to the best of his judgment and ability; replacing thereby such sums as he has expended and providing for such expenses as he may hereafter incur in the execution of said agreement between him and the said Republic, charging to the association to be formed by this and similar agreements nothing by way of compensation for his services or for salary as chief agent of such association, but only his personal, travelling and other expenses incurred or to be incurred by him as chief agent, for conducting the said agreement, and the scheme of colonization proposed by it, to a successful issue.

And the said party, moreover, binds himself to provide, as soon as practicable, one or more suitable and trustworthy persons to act, in the order in which they shall be named, as chief agents of the association to be formed as aforesaid, in event of the death, sickness, inability from any cause, or disinclination further to act, of
245 him, the said party of the first part to this agreement.

Such successor shall have every power and authority vested or recognized by this agreement in the first party thereto, and in case of the necessity of resorting to such other agent or successor, as his interest will be much less than that proposed to be retained in the former agreement by the chief agent hereby created, any successor of said agent shall be entitled to receive a reasonable compensation for his services, over and above his actual expenses while engaged in the service of the association: *Provided*, That such extra compensation shall not exceed $2,000 per annum, and shall be charged upon and paid out of the common funds of the association.

The names of the persons appointed as aforesaid to succeed the part of the first part as chief agent in case of his death, disability or declining to act, shall be transmitted to the Department of State of the Republic of Texas, to be filed or recorded for the information of all persons interested therein; and shall be in writing subscribed by the party of the first part to this agreement; and from the time that some one of the persons so named and entitled by priority to act shall enter upon the duties of chief agent, he shall have all and every power vested by this agreement in the party of the first part thereto; but nothing herein contained shall divest the party of the first part of any share or part of any share of his interest in the said agreement between himself and the Republic of Texas, except the share hereby

conveyed to the part ..... of the second part to this agree-
246 ment.

The party of the first part, so long as he continues to act as chief agent of the association hereby created, and each of his successors, so long as he shall act as such, shall have every power necessary or expedient for carrying into effect the agreement of the twenty-ninth of January, 1844, and this agreement.

He shall have especially the following powers, though, by their enumeration, it is not designed to exclude others which circumstances may render necessary or proper, viz:

The name of the association shall be (a common name being authorized by the said agreement of the twenty-ninth of January last) "The Texas Association;" and the chief agent shall subscribe his name accordingly to all acts of his in behalf of the association, and by such subscription shall bind the parties of the second part, as well as himself and all other associates under the agreement of the twenty-ninth of January aforesaid.

His successor as chief agent shall have power in like manner and to like extent to bind the said first party, and all persons claiming by, through, or under: *Provided*, That no associate, nor the party of the first part to this agreement, shall be bound to an extent beyond the interest they respectively hold in or under the said agreement of the twenty-ninth of January, 1844, and the sum which such
247 associates bind themselves to pay, by this and like agreements, toward the funds of the association.

The chief agent shall have, also, the following powers, viz: to borrow money on the credit of the common funds in lands or debts due to "The Texas Association," or to become due, whenever in the opinion of the chief agent it shall be deemed expedient for the interests of the association.

He shall have power to sell or hypothecate any of the lands of the association for the purpose of paying any debts thereof, or purchasing for the common benefit, and colonizing the sections of land reserved to and by the Republic of Texas out of the grant aforesaid to the party of the first part and such associates as he may choose.

He shall have power to grant to any emigrant family, for reasons seeming to him good, more than the minimum quantity of a quarter section of land, on such conditions as he may please to annex thereto; and to sell to such family, or any other, the residue of the section or any part thereof.

He may make contracts for the improvement of any of the lands of the association, whenever he may deem such contracts expedient, and pay for such improvement out the lands or moneys of the association.

248 He shall have power to lay in, by purchase, and to sell to such emigrants as may come unprovided, necessary food, valuable trees, shrubs or seeds, and farming and garden tools; and, in cases of necessity, to lend to the emigrants small sums of money

out of the funds of the association, to be thereafter repaid to the association.

He shall contract for the survey and distribution into sections and fractional parts thereof of such lands as may be required from time to time, for the immediate settlement of the emigrants, and may purchase with the lands or money of the association for the mutual benefit of the association and the vender any liabilities of the Republic of Texas, and to invest them in the purchase and colonization of the reserved sections, or any part of them, according to such terms as he may deem advantageous to the association.

He may contract for the passage of emigrant families from the United States of America or their territories, or from any country in Europe to the lands to be colonized, on such terms as he may deem expedient for the association, and charge upon the lands to be granted to the several emigrant families, either by mortgages or deeds of trust or other security, all advances made for their transportation or their other necessary expenses or outfit.

249 He shall have power to sue for and recover any lands occupied or claimed under any prior grant or location within the boundaries of the tract aforesaid set apart for colonization which he shall deem to be illegally granted or located, or to compromise all or any claims founded on such occupation or prior grant or location on such terms and conditions as he may consider expedient; and, forasmuch as the various duties of the chief agent will be of necessity spread over so large a surface as to render it beyond the power of one man to perform them all in due time, he shall have power to appoint whenever he may deem it expedient, and to fix and pay the compensation of any number of sub-agents, and to prescribe their respective duties, provided that all the expenses incurred by the chief agent or sub-agents shall be chargeable upon the funds provided by this and similar contracts or agreements between the party of the first part and his associates and upon the lands of the association and the money, notes, and bonds derived from the sale or hypothecation thereof; but neither the party of the first part nor any of his associates shall be bound by any act of his sub-agents, or by any contract of his as chief agent, beyond his or their express agreement in writing and their interest in the common property acquired or held for their benefit; and to this extent each and every associate

250 of the party of the first part, as well as the said party himself, shall be bound for all excess of expenditure beyond the funds derived from the sale of the forty-hundredths, being forty shares of the entire interest to be acquired by the agreement of the party of the first part with the Republic of Texas, and in the exact and just proportion of the number of their respective shares; the party of the first part having granted five shares of stock to Dr. Daniel Rowlett, of Texas, late of Virginia, without any pecuniary consideration, for services to be rendered to the association in Texas, and having determined for the present to reserve fifty-five of his whole interest to himself and his legal representatives, and to sell only forty shares of

his entire interest, in order with the funds to be derived therefrom to carry on with promptitude and success the plan of colonization devised by his agreement of the twenty-ninth of January, 1844, with the Republic of Texas.

And the party of the first part expressly reserves to himself the right to retain or dispose of he pleases, for his own use, the fifty-five shares of his reserved interest in the said agreement of the twenty-ninth of January, 1844, between himself and the Republic of Texas: Provided, however, That no disposition thereof which he may make shall withdraw any of his reserved interest aforesaid from a proportional charge of all the expenses of the association exceeding in the aggregate the sum derived from the sale of the forty shares
251 set apart as aforesaid, and from such other resources as the fees paid by the colonists for their surveys and plats and the sale or other application of the lands of the association may supply.

And inasmuch as it is desirable that the various shareholders of "The Texas Association" shall become actual settlers and cultivators of the soil of Texas which they may acquire by means of their association under this agreement and other similar agreements founded on the agreement aforesaid of the twenty-ninth of January, 1844, between the party of the first part to this agreement and the said Republic, it is further understood and agreed by the parties to this agreement, and they mutually covenant to that end, that the party of the first part shall retain and appropriate to his own use at any time within the five years allowed by the Republic of Texas for the colonization of the lands described by the agreement of the twenty-ninth of January, 1844, between the said Republic and the said party of the first part, any sections or parts of sections acquired by the association under or by virtue of said agreement of the twenty-ninth of January, 1844: Provided, That the whole extent of any lands so retained or appropriated to his own use by the party of the first part shall not exceed six per cent. of the whole quantity of land at any time so acquired; such quantity to be estimated and
252 charged to the party of the first part in the final distribution among "The Texas Association" of all the lands acquired by them as so many acres of unimproved lands of average value with the lands in general of the association, however much they may have been improved or may have appreciated in value from their vicinity to other improved lands.

And the power hereby recognized and conceded to the party of the first part to set apart and appropriate to his own exclusive use six per cent. of all lands acquired by the association, shall, in like manner, extend to the sections reserved by the Republic in the agreement aforesaid of the twenty-ninth of January, 1844, with this condition: That on the exclusive appropriation of six per cent. of the reserved sections acquired the association, if the same shall have been purchased by the funds thereof, whether consisting of lands or money, the party of the first part, or his legal representative, shall repay any sums the association may have expended therefor, or re-

place an equivalent thereto in lands; but if the reserved sections shall have been paid for by the emigrant families in the purchase of their lands, the association shall be deemed to have no claim for reimbursement of any purchase-money.

In like manner any holder of a share of one-hundredth part or more of the entire interest of the association may, in virtue of his being a member thereof, set apart for his own exclusive use one per cent of the common lands acquired by the association; provided he shall remove to Texas or occupy and improve the same
253 by his agent. And it shall be a sufficient evidence to set apart any such land for separate or exclusive use, to describe it by its proper bounds and declare such intent by a written instrument under the hand and seal of the shareholders, and recorded in the county in which the land lies that is so set apart.

And it is further covenanted and agreed by the parties to this agreement, that at the end of the term granted by the Republic of Texas for the colonization of the lands set apart therefor by the agreement aforesaid, of the twenty-ninth of January, 1844, there shall be a just partition of lands or other property acquired by "The Texas Association."

In this partition the distribution shall be by lottery where equal interests are to be alloted, under the agency of three commissioners, to be appointed by the President of Texas for the time being, at the request of any three associates, or of any person having three shares of the one-hundredth, into which the whole stock of the association is considered as divided. Should the President decline acting on such request, the partition shall be made, whatever be the authority conducting or charged with it, by distributing the whole lands of the association into one hundred parcels of as equal quantity and value as practicable, and allowing any shareholder of one or more
254 shares to draw one parcel for every share he holds. Every shareholder who shall have already appropriated to his exclusive use the whole or part of the land to which he is entitled, shall account for the same by surrendering all or any equal quantity out of the parcel he shall have drawn, and all lands so surrendered shall be again classed and drawn out by those associates or shareholders who may be entitled thereto, according to their respective proportions.

All sums of money shall be divided into equal portions, one hundred in number, and paid over according to the respective interests the shareholders. Any sums due to the association shall be collected by the chief agent at the date of the said partition, and paid over, in like manner, as speedily as practicable, to the persons entitled thereto. And the said party of the first part, for himself and his legal representatives and his successor as chief agent, or such of them as shall enter upon that trust, covenants with the part of the second part and legal representatives, to render once at least in every six months to the Department of State of the Republic of Texas, or at any time at the request in writing of any

shareholder or holders of five shares of the common stock of "The Texas Association," a full and true account of all
255 moneys expended by him, or as far as he knows the same, under his authority and for "The Texas Association," under general heads of expenditure, distinguishing therein his personal expenses from all other heads, and stating all sums received by him or his sub-agents on account of his or their agency, and detailing by their general titles and objects all contracts made by him or them, with the names of the contractors, their places of abode where known, and the dates of their respective contracts; also the number of emigrant families actually settled on the lands aforesaid; and whatever else may tend to show the actual condition of the affairs of "The Texas Association" and their future prospects.

Finally, the second part to this agreement, for heirs, executors, administrators, and assigns, covenant with the party of the first part thereto to pay to the said first party as agent of the association, or to such person as he may appoint to receive the same, or to his successor in the chief agency of the association, or to such person as he may depute to receive the same, one fifth-part, namely, ... expressed in this agreement, and the like sum on the first day of October of each of the years ..... until the entire sum of ..... hundred dollars be paid as before stipulated; provided, that if at any
256 time for the space of thirty days after the day of payment, or the same shall become due, any one of said installments be not paid at such place as shall be previously named by said agent or his successor, all the right, title, and interest of the part .... of the second part, and of any and of every assignee or other legal representative thereof, and of all persons claiming by, through or under him, them or any of them shall become utterly void; and this agreement, and every clause thereof, shall cease and determine, as if the same had never been made; and all right, title or interest in and to the share of the stock of "The Texas Association" hereby conveyed shall revert to the party of the first part or to his legal representatives, to be held, or otherwise disposed of, for the benefit of "The Texas Association" hereby formed: provided, that if the party of the first part shall himself pay the sums or sums due, and thereafter as they become due for the said share for the use and benefit of the association, he may hold the same on his own private account, in like manner as he holds the fifty-five shares herein reserved for his exclusive benefit.

In testimony whereof the parties aforesaid have hereunto set their hands and seals on the day and year in this agreement first mentioned.

Test:

257 And complainant also produced and read upon the hearing the following:

Depositions of P. J. Pillans.

Interrogatories propounded by complainant to P. J. Pillans.

In the Circuit Court of the U. S. for the Fifth Court, District of Western Texas, at Austin.

John Hancock, complainant, *v.* J. J. Groos, Land Commissioner, &c., defendant. } Interrogatories to witness for complainant.

Interrogatories propounded by the complainant, William Preston, to P. J. Pillans, witness in complainant's behalf herein, and to be answered upon oath.

1st. First Interrogatory:

State your name, age, and occupation, and how long you have pursued that occupation. State also your present place of
258 residence and places of former residence other than your present, if any.

2nd. Second Interrogatory:

State whether you knew Charles Fenton Mercer. If you did, state when you first knew him and where, and under what circumstances the acquaintance was formed.

3rd. Third Interrogatory:

Did you have any business relation with Charles Fenton Mercer? If yea, state what that relation was; how it commenced; what were its objects and purposes; what was the date of its commencement, and how long it lasted.

4th. Fourth Interrogatory:

If you state that you had any business connection with Charles Fenton Mercer, please state more particularly whether you had any knowledge of or connection with the business of what is commonly called the "Mercer Colony" grant, in the Republic or State of Texas.

Did you have any knowledge of or connection with the drafting of the contract between Mercer and the Republic of Texas by Sam Houston, President, or in copying the same for signatures, or
259 in otherwise preparing the same? If you did, please state fully when and where it was, and what was done within your knowledge, or by and what were the circumstances which led you to take part (if any you did take) in the preparation of the contract.

5th. Fifth Interrogatory:

Were you at any time after the signature of the Mercer Colony contract on 29th January, 1844, employed by Charles Fenton Mercer in any capacity in about the business of the Mercer Colony grant?

If you were, please state as fully as you can the date and nature of your employment, and all that was done by you or by those employed by you, or by those associated with you.

6th. Sixth Interrogatory :

Do you know of any surveyors being employed by Mercer or his associates to run and mark the lines of the grant? Were any surveyors employed by you?

If you did employ any, state whether employing them yourself or as representing Mercer?

Give the names of such surveyors, if you can recall them, and their now residences, if they are alive, and you know their residences.

7th. Seventh Interrogatory:

If you say that any surveyors were employed, state whether
260 they actually went to work to run the lines of the colonial grant. And if they did, state when and on what line or lines they commenced.

Did you or not go with any of the surveying parties, and if so, where and when?

Did you or not see stakes or marks established along the line or lines, and if so, state as fully as you can all you know as to the purpose of such stakes or marks, the intervals between them, and the reason for establishing them, and who marked, or drove, or established them?

8th. Eighth Interrogatory:

State whether or not there was any interference with any such surveyors or surveying parties, or any threats of violence to them or any one engaged by Mercer. State how and why such interference or threats were made, (if any were made,) and explain the reasons for such, (if any there were,) and condition of affairs in and adjacent to the colonial grant, and the character of the population, whether peaceable and calm, or violent and turbulent.

9th. Ninth Interrogatory :

State whether there were or not any organizations to im-
261 pede Mercer and his agents and surveyors, or to destroy surveyors' instruments, or to obliterate marks, stakes, &c.

If yea, give the particulars as fully as you can.

10th. Tenth Interrogatory:

Did you have any connection with or instrumentality in the introduction or location of colonists by Mercer within the colonial limits? If you did, please state fully what was done by you or by others within your observation or knowledge.

11th. Eleventh Interrogatory:

Were any colonists introduced or settled within the colonial grant in the year 1844 after the signature of the contract? If yea, state how many were, in your opinion, so introduced and settled the first year of the contract.

Did you or not youself locate them or some of them, and if yea, state the circumstances.

12th. Twelfth Interrogatory:

Were you or not during the time last enquired about familiar with the terms of the Mercer contract?

If you were, state whether according to your present recol-
262 lection the terms of the contract between Mercer and the Republic of Texas were observed by Mercer and his agents.

13th. Thirteenth Interrogatory:

Did you or not make reports to Mercer from time to time? If so, what subjects were embraced by them?

14th. Fourteenth Interrogatory:

Was the performance of your duties as agent for Mercer (if you were such agent) attended with any personal peril to you?

Were any of his agents in peril?

15th. Fifteenth Interrogatory:

Did you ever know or meet Claxton Taylor? If so, when did you meet him and where, and what his employment? Had he any connection with Mercer or the Mercer Colony grant? If so, please state fully what you know on the subject.

16th. Sixteenth Interrogatory?

Do you or not know of any efforts made by Charles Fenton Mercer to introduce colonists within the grant, or of any personal visits to the grant in the interest of or in connection with the colonial enterprise? If you do, please state fully what you may know.

263 17th. Seventeenth Interrogatory:

Did you at any time after you ceased to be employed by Mercer, and before the year 1849, visit any part of the territory embraced in the Mercer grant, or the territory near it, or learn its condition? If you did, please state whether or not the population within the boundary of the grant had or had not increased in numbers; and if so, how much, according to your best judgment and information? And state, also, whether there was or was not, between January, 1844, and January, 1849, an influx of population, and what was the influx, large or small, as to numbers?

18th. Eighteenth Interrogatory:

State whether you know what were the boundaries of the colonial grant to Mercer. If you do, please now repeat them in your answer

to this interrogatory, and state whether the colonial grant is or is not defined as to its boundaries by the natural objects named, sufficiently to apprise all concerned of its location and extent.

And were or were not the boundaries of the colonial grant to Mercer understood by people in that section of country before the surveyors run the lines, and were or were not the public threats made by persons who knew the boundary from the natural
264 objects and before the lines were run, or before the actual survey was completed?

And were or were not the boundary and location of the Mercer Colony grant matters of notoriety before the actual survey was commenced, so that settlers were notified as to same, and enabled to locate within the same, and the reservation of the grant publicly and generally understood by all *bona fide* emigrants?

19th. Nineteenth Interrogatory:

Do you know or can you set forth other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

W. PRESTON,
JOHN MASON BROWN,
HANCOCK, WEST & NORTH,
for Compl't.

265 *Cross-Interrogatories to Complainant's witness, P. J. Pillans.*

1st. First Cross-Interrogatory:

Where did you reside, and where were you on the 2d day of August, 1845; and what business, if any, were you engaged in at that time?

2d. Cross-Interrogatory Second:

Were you acquainted with Thomas C. Bean, John Miller, and John Hilhouse, or with either of them? If so, which of them did you know, and when and where did you know them? Are they living or dead; and, if living, where do they reside?

3d. Fourth Cross-Interrogatory:

Did you ever reside within the limits of Mercer's Colony? If so, at what place and at what time, and during what time, and in what business were you engaged, if any, during such time?

5th. Fifth Cross-Interrogatory:

How often did you see Charles Fenton Mercer in Texas, if ever? At what particular place or places in Texas did you see him, and at what date or dates, and how long did he remain in Texas each time,

and what business, if any, did you know him to be engaged in
266 while in Texas? When did you last see him in Texas, or know of his being in Texas, and at what place was he, and where did he go to when he left Texas? Is he living now, or dead? If dead, where and when did he die?

6th. Sixth Cross-Interrogatory:

If you were ever in the employment of Charles Fenton Mercer, state whether or not that employment was evidenced by any written instrument, and if was, attach the same or a true copy thereof to your answers, and write your name thereon to identify it.

7th. Seventh Cross-Interrogatory:

If you state that any of the lines in the Mercer Colony grant were ever surveyed, state particularly how you know that fact. Which of them were surveyed? When was this surveying done? Who was the surveyor that did the work? Who were the chain carriers? What persons composed the surveying party? Name all of them. Which of them, if any, are now living, and where do they reside? Where did these persons reside at that time? Where did this surveying party start from, and at what point did it begin the work of surveying? If you were with the party at any time, how long did you remain with it? At what particular place or places were
266½ you with the party? What settlers, if any, resided on or near the lines that were surveyed, if any lines were surveyed? Name the nearest settlers to said line or lines that resided there at the time of said survey, and the particular place or places of their residence.

8th. Eighth Cross-Interrogatory:

If you state that there were stakes or marks established on said line or lines, describe the same particularly. What kind of stakes were used? What kind of marks were made?

9th. Ninth Cross-Interrogatory:

If you state that there were more surveying parties than one, state how many such parties there were. Who composed each of said parties? Who were the surveyors? Who were the chain carriers? Which of them, if any, are now living, and where do they reside? Where did each of these parties start from? When was this? Where did they begin work? How long were they engaged in surveying the Mercer Colony lines? Which lines or portions of lines did they survey, and how do you know the fact that any line or any portion of any line of said colony was surveyed and marked?

267 10th. Tenth Cross-Interrogatory:

If in answer to direct interrogatory 8th you state that *that* there was any interference with said surveyors or surveying parties, or any threats of violence to them, state particularly where this occurred. Name the person or persons that made any threats of vio

lence. Where did those persons reside at that time? Are they now living or dead? If living, where do they reside? What was the kind, character or extent of such interference, if any? What threats were made, if any, and by whom? State fully and particularly and in detail all about any such interference or threats, and give also your means of knowledge.

11th. Eleventh Cross-Interrogatory:

If in answer to direct interrogatory 9th you say there were organizations to impede Mercer and his agents and surveyors, or to destroy surveyors' instruments, or to obliterate marks, stakes, &c., then state the character and extent of such organization. At what particular place or places did such organization exist? At what time were they first established? What persons composed them? Name the persons belonging to such organizations, or such of them as you can remember. Are any of the members of such organiza-
268 tions now living? If so, name them, and state where they reside. Who was the head, or leader, or chief of such organizations, if any? What was done by said organizations in any way impeding Mercer or his agents or surveyors? State acts that were committed, if any, and state the time and the place of the commission of any such act as impeded said Mercer or his agent or surveyor. Who committed such acts? Name the person or persons. What persons were present at the time? State fully, particularly, and in detail all that occurred, and give your means of knowledge.

12th. Twelfth Cross-Interrogatory:

Were any surveyors' instruments destroyed? If so, when and where was this done? What person or persons destroyed the instruments? Name such person or persons. State fully and particularly all the circumstances of such destruction, and your means of knowledge. Were any marks, stakes, &c., of the surveyors' lines obliterated? If so, by whom? Name the persons. When did this occur? Who were present when it occurred? Where were these marks or stakes located? On what line, and at what point on such line, in what manner were the same obliterated? State fully, and state your means of knowledge.

269 13th. Thirteenth Cross-Interrogatory:

If in answer to direct interrogatory 10th you state that you had any connection with, or instrumentality in the introduction or location of colonists by Mercer within the colonial limits, state particularly how and when such connection or instrumentality began, and at what place, and what did you undertake to do, and what did you do, if anything, about such business; and if you state that others did anything, state who those other persons were, what was done by them, and when it was done. If any persons were introduced as colonists in said colony by you, or by any other person within your

knowledge, state who were the colonists so introduced; name them. Where did they emigrate from; in what part of said colony did they settle, and at what date; how long did they reside there; what became of them; are they now living, and if so, where do they reside; in what manner and by what means were they introduced? Did they not come to Texas of their own accord and at their own expense? State fully and particularly all the facts and circumstances connected with any such introduction of colonists.

270 14th. Fourteenth Cross-Interrogatory:

If in answer to direct interrogatory 11th you state that any colonists were introduced and settled in said colony in 1844, after the signing of the contract, name such colonists? Where did they emigrate from; in what particular portion of said colony did they settle; how long did they remain settled in said colony; who or what induced them to settle in said colony; who furnished them houses; who supplied them with arms and ammunition; are any of these colonists still living, if so, name them and state their residences? If you located any colonists, name those you located. When did you locate them; at what particular place in said colony did you locate them; in what did the locating of them consist; are any of them living now, and if so, name them and state their residence; where did they emigrate from, and how long did they remain settled in said colony, and what number did you locate in said colony? If you give your opinion as to the number of colonists introduced and settled in said colony the first year, as called for in direct interrogatory 11th, state upon what facts or information you base that opinion? In
271 what portion or portions of the colony were these settlements made? Name the colonists so introduced and settled, or as many of them as you can remember. Where did they emigrate from; who, if any one, introduced and settled them; did they not come to and settle in the colony without the solicitation or aid of any one, and did they not build their own houses and supply themselves with arms and ammunition without the help of Mercer or any of his agents or associates?

15th. Fifteenth Cross-Interrogatory:

If, in answer to direct interrogatory, you say that Mercer and his agents observed the terms of the colonial contract, specify particularly what were the terms of said contract as you understand the same, and state fully and particularly the manner in which said terms were observed; what was done in observing said terms; who were the parties that did those acts; when were the acts of observance done; your means of knowledge; do you know these things of your own knowledge?

16th. Sixteenth Cross-Interrogatory:

If you say that you made reports from time to time to
272 Mercer, state whether or not such reports were made in writing. Were they sworn to? Upon what information were

such reports made? How many such reports did you make, and at what dates?

17th. Seventeenth Cross-Interrogatory:

If you say that you or any of Mercer's agents were in personal peril, what was the nature of such peril? Was it on account of such agency? When was this, and at what place? In what did such peril consist? How and from whom did you learn about? Name the persons who occasioned or threatened this peril. Was any violence done you or to any of said agents; if so, when, where, and by whom, and what was the violence? State all the particulars about it, and what occasioned it.

18th. Eighteenth Cross-Interrogatory:

If you say that you visited Mercer Colony after your employment ceased and prior to 1849, state where you resided at that time, what portion of the colony did you visit, how long did you remain, what was the object of your visit? If you state that the population of the colony had increased and give your opinion or judgment as to the amount of such increase, state upon what facts or information you base your opinion or judgment; what caused such in-
273 crease; in what portion of the colony did this increase appear to be mostly; by whom or by what means was the increase brought about; how was it as to increase of population in other parts of Texas at that time.

19th. Nineteenth Cross-Interrogatory:

What natural objects define the boundaries of Mercer's Colony? Name them. Did you ever see those natural objects? If so, when did you first see them? What natural object defines the southwestern boundary of said colony and its western boundary? Where does the boundary line of said colony cross the Trinity river? How do you know where it crosses said river? Do you know a Cedar creek that empties into said Trinity river within or near the boundary lines of said colony? If so, where is said creek? What is its width? Where does it head? On which side of said river is said creek? At what point on said river does it empty into said river? What creek is next above it on the same side of said river, and what creek is next below it on the same side of said river? When did you first know the creek, and what was it called when you first knew it? Do you know any creek called Cedar creek that empties
274 into said Trinity river? If so, describe it particularly as you have the other one.

20th. Twentieth Cross-Interrogatory:

What interest have you now or what interest have you ever had, and when, in the Mercer Colony grant? Are you not a shareholder in the "Texas Association"? Who are the shareholders in that association? Name them as far as you know them, and state where they reside.

21st. Twenty-first Cross-Interrogatory:

Do you not know the Mercer contract was declared forfeited and null and void by a decree of the District Court of Navarro county in the year 1848, in a suit wherein the State of Texas was plaintiff and Charles Fenton Mercer and his associates were defendants? Were you not a witness in that suit, and did you not testify therein? Where were you residing in 1848? Was it not generally understood after 1848 the Mercer Colony contract was forfeited and no longer of any validity? Did not Mercer and his associates cease after that time to assert any rights under said contract? If not, what did said Mercer or any of his agents or associates, and which of them, do towards asserting any rights under said contract?

275 State fully and particularly.

22nd. Twenty-second Cross-Interrogatory:

Name as many of the first settlers in Mercer's Colony as you can now remember, and state as near as you can the dates of their settlement and the portion of said colony in which they settled. What was the extent of your acquaintance with the settlers in said colony in 1845, 1846 and 1847, respectively?

WILLSON & GAINES,
PEELER & MAXEY,
Sols. for Defendant.

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.

George Hancock, devisee,
v.
W. C. Walsh, Comm'r of the Gen. Land Office of Texas. } In Equity.

276 The deposition of P. J. Pillans, taken by Tho. P. Smith, a duly commissioned, sworn and acting Notary Public of Jefferson county, in the State of Kentucky, at the office of said notary in the law building at the corner of Center and Green streets, in the city of Louisville, on the 24th day of May, A. D. 1880, to be read as evidence on the part of the complainant in the above-entitled suit in equity pending in the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin, under and in pursuance of and agreeably to the agreement hereto attached and made part hereof, and in answer to the interrogatories and cross-interrogatories hereto attached and herewith returned. The witness was first duly sworn by me according to law, neither party, agent, or attorney being present. After the witness was sworn the further taking of the depositions was adjourned to meet to-morrow at 10 o'clock, a. m., at said office.

THO. P. SMITH,
No. Pub., Jeff. Co., Ky.

Tuesday, May 25, 1880, met pursuant to adjournment and continued the taking of the depositions of P. J. Pillans, as follows:

277 To the interrogatories-in-chief, the witness answers as follows:

First Answer.—My name is P. J. Pillans; age, 64 years; occupation, civil engineer; my present residence is Mobile, Alabama, formerly Texas—Bonham, Texas, Santa Fe, and New Mexico; pursued my profession many years.

Second Answer.—I did know Charles Fenton Mercer, first during the winter of 1843–44 at Washington, Texas; we boarded at the same house when he was negotiating with President Samuel Houston for the colony grant.

Third Answer.—I did; I was his agent for running and marking the boundary line of the Mercer Colony and for attending to any other duties pertaining to the said colony in the northern part of the Republic of Texas. It commenced during the winter above mentioned, some time in February, I think. Our business relations ceased in May, 1845, I believe.

Fourth Answer.—I had, as already mentioned. I was the
278 agent of General Mercer in complying with the conditions of the contract with the Republic of Texas, and had general charge of his interest there. I knew of the negotiations and had frequent conversations with both Mercer and Houston on the subject, and copied the contract after it was drawn by General Mercer in compl*y*ance with the agreement himself and General Sam Houston, who was President of the Republic at that time, which copy I believe was the one signed by the parties. This was at Washington, Texas. I was at the time idle, and was not averse to such occupation, and though I do not now recollect, it is probable that General Mercer may have informed me he designed to employ me after the contract should be completed.

Fifth Answer.—Immediately after the contract was signed I was employed to go to the northern part of Texas and make the necessary arrangements for running and marking the boundary line, and for such other surveys and matters in connection with the colony as might become necessary. Funds were given me and authority to draw on Mr. Lindenberger, of New Orleans, for what more might be needed. I purchased the necessary outfit and made the
279 journey overland from Houston to Bonham, Fannin county, where I made my headquarters, boarding with one Bailey English. I immediately employed William H. Hunt, a surveyor of Fannin county, to run the boundary. As the line from Red River south 50 miles lay within what was well known as Peters's Colony, it was deemed necessary to run this part, so I authorized him to commence at the east line of Peters's Colony and run east. This he did.

Sixth Answer.—William H. Hunt, as stated in answer to last preceding interrogatory, was employed by me, and I recollect a Mr. Claxton Taylor, who later was engaged in subdividing the land into sections, as was also Thomas C. Bean. Mr. Hunt knew full well that I was employing him only in my position as agent of General Mercer; when last I heard Hunt lived in Bonham, or near there, in Fannin county, Texas. Taylor, I think I have learned, is dead; Hunt also, probably; 35 years witness the death of most of those who were in active life at their beginning.

Seventh Answer.—Hunt did run the line east from the east line of Peters's Colony, 50 miles south of Red River, and while so engaged drove or had driven a stout stake, marked with the number
280 of the mile on it. This was necessary, not only to mark the line in the prairie, but to enable subsequent surveyors to subdivide the lands into sections. I was with Hunt's party, while engaged on the northern boundary for many days together, at various times. While with the party I, myself, cut the mile number in the stakes, and they were driven into the ground at every mile.

Eighth Answer.—I do not know that any of the surveying parties were molested, though threats of violence were made. The people in the Red River border of counties immediately north of the colony, like all of those who at that time had lived in Texas long, had large numbers of unlocated land scrip, which they desired to locate on the reserved lands as soon as the prohibition to location should be removed by Congress. The members of Congress of 1843–'44 had been elected from several of the counties bordering and in Cherokee reserved land, on promise to throw open these lands to occupancy, and the colony covering much of this reserved territory, although the act reserving the lands was repealed at this session, an-
281 gered all these speculators and made them hostile to the colony grant.

Ninth Answer.—Soon after it was known that an agent of General Mercer was in the neighborhood, threats and murmurings could be heard. After a time these took shape in a public meeting, as I learned, being held at Paris, Lamar county; but what was done at that meeting I do not at this time recollect, save a caution sent to me to beware; to which I replied that I had heard the wolves howl often in Texas, and should do my duty. But not long after a very large one was held at Clarksville, Red River county, I think, though it might also have been at Paris; at this very violent resolutions were passed denouncing the colony agent and instructing a committee by it appointed to destroy the instruments, scatter the surveyors, and put the agent across Red River. The chairman of this committee was Colonel Jim Borland, a firm, fearless man, but just and ready to listen to reason. Nothing happened, but these things and threats somewhat delayed operations. Colonel Borland lived, and, for aught I know, still lives in Lamar county.

Tenth Answer.—I received such colonists as came and settled on the lands. General Mercer himself was advertising the col-
282 ony. Many, perhaps all, such advertisements were sent to me by General Mercer. The lands granted to General Mercer were for the most part without settlements. I never met with but one family claiming to have settled before the grant to Mercer, so far as my travels within the grant extended. They were confined mostly to the northeastern part of the territory embraced in the grant. I also knew of a few families on Chambers Creek, west of Trinity. There may have been others, but certainly they were very few. The settlers at first went into the northeast corner, east of the Sabine River, where I went to issue certificates with Dr. Rowlett to those who were entitled to them; Thomas C. Bean being also present, we gave certificates to considerably more than the one hundred required by the contract. There were some who refused to take the certificates of title from the colony, but they were not numerous.

Eleventh Answer.—There were issued to actual settlers, who complied with the requirements of the contract, during the first year, more than one hundred families; one hundred and eighteen, as I find upon examinations of returns made and sworn to at
283 the time by Rowlett, Bean, and myself.

Twelfth Answer.—I was. They were in every particular as rapidly as possible.

Thirteenth Answer.—I did. Everything that I thought of moment in relation to the trust in my hands.

Fourteenth Answer.—The appointment of a body of fearless and reckless men to destroy our instruments and put me by violence out of the country might be considered by some to have put me in peril.

Fifteenth Answer.—I did meet Claxton Taylor. I met him frequently in Bonham after my connection with General Mercer had ceased. He was engaged by General Mercer in subdividing the lands in the colony into sections as required by the contract. He was frequently at my house, and so informed me.

Sixteenth Answer.—I know that General Mercer freely ad-
284 vertized the colony, and was constantly traveling in its interest, and during the year I had charge made two or three visits to the colony.

Seventeenth Answer.—I did not. I can only speak of the year from April, 1844, to May, 1845, because I never went within the colony afterwards. During that year more than one hundred families as defined by the contract was settled on the lands.

Eighteenth Answer.—I do, having recently read the contract. The eastern line of Peters's Colony, or its approximative location, was pretty well known, and those living in the neighborhood had formed mod-

erately accurate notions of the northern and eastern line of Mercer's grant, but as to the rest I do not know. A line from a creek on one river to one on another river, as well as a river boundary, would probably be almost as well known in the neighborhood as in an unsurveyed county line. There were few or no emigrants before the north and east lines were actually run, and those coming in from the Red River border, the way they almost all came, would have no difficulty as to boundary.

285 Nineteenth Interrogatory:

To this interrogatory I can only state that the activity and energy constantly displayed by Gen'l Mercer, and the deep interest taken by him at his age, were sources of astonishment to me. His instructions were at all times explicit to be particular in fully complying with the conditions of the contract, and they were obeyed by me to the letter.

And in further answer to this interrogatory, supposing it to be material, I will state that I have before me certified copies of a report and accompanying letter of Gen'l Mercer of date Jan'y 17, 1845, on each of which I have written my name, and which are filed herewith and made a part of this deposition. Of the general contents of these I know nothing, except I am able to verify the statement in the report (second annual report) that two bodies of surveyors were in the field for subdividing the lands into sections and completing the lines at that date, and the claim in the letter which states that my illness had delayed the surveys. Early Oct., 1844, when on my way to Nacogdoches in relation to some claims previously located within the colony grant, I was taken sick and laid ill for many weeks at Nacogdoches with an attack of congestion on the brain, from which I did not sufficiently recover to enable
286 me to return until near the close of Dec'r of that year, and was still left unable to attend to business for many weeks, being unable to get either on or off my horse.

And I also have before me what purports to be a certificate of stock in the Texas Association, with reported copies of contract printed thereon, and a map of Mercer's Colony grant. One of the contracts I recognize the one made by and between Charles Fenton Mercer and Gen'l Sam'l Houston, to which I have before alluded. It recalls to my memory the various terms and stipulations of the contract, with which I was familiar, having to make constant reference to it, and I doubt not is a correct copy. Of the map, or by whom made, I know not. It was doubtless obtained from the map kept in the General Land Office at the seat of government, which was constantly enlarged and added to as authentic surveys were filed therein. The outlines of the colony delineated thereon, and in accordance with the requirements of the grant, and from my general knowledge of the country would say that it is as accurate perhaps as was necessary for the purposes for which it was made. I refer to the certificate of stock and the contract and map thereon filed with the

interrogatories addressed to James Craik, J. Stoddard Johnston, and others, and ask that the same be read as part of this
287 deposition.

Cross-Interrogatories to P. J. Pillans by defendant's counsel, the witness answers as follows:

First Cross-Int'y. Answer:

In Bonham, Texas, after my connection with Gen'l Mercer had ceased on account of ill-health, I, at the date specified, think I had opened an office for the practice of the law.

Second Cross-Int'y. Answer:

I was well acquainted with Tho. C. Bean; the other persons I cannot now recall, if I ever knew them; Bean was a deputy surveyor and deputy clerk of the court, and resided in Bonham. Whether alive or dead I do not know.

Fourth Cross-Int'y. Answer:

I did not. While agent of Mercer, Bonham was my headquarters, which place I reached, I think, in March, 1844, and remained there when not away on the business of the colony, attending to no other business during my connection with Gen'l Mercer, which terminated in 1845, on the first of May. Afterwards, until the
288 spring of 1849, I remained in Bonham variously occupied, and at the practice of the law.

Fifth Cross-Int'y. Answer:

Two or three times at Bonham, besides at Washington, Tex. I cannot give the dates, nor can I at this late day pretend to recollect how long he remained each time. When there he came to look after the interests of his colony. I last saw him, I think, during the winter of 1844–'45. Where he then went to I do not know. I have learned that he is dead, but do not know when he died. He was an old man when first I became acquainted with him.

Sixth Cross-Int'y. Answer:

I now have no paper connected with my engagement with Gen'l Mercer.

Seventh Cross-Int'y. Answer:

Because I employed W. H. Hunt, a surveyor of Fannin county, to run the lines, and furnished him a sufficient party, and I was frequently with him while prosecuting the work. Hunt was put to work by me as soon as I could make the proper arrangements after my reaching Bonham, in March or April, 1844, and went to work
289 on line commencing fifty miles south of Red River, and running east. I have no memoranda of the names of the parties engaged, and, therefore, cannot give their names. They were taken from citizens of adjoining counties. I was with the party at several

times, and remained with it for many days each time. I was with it when crossing the heads of Sabine River, and when among the Sulphurs. It is now impossible for me to recall the names of those I saw, perhaps but once or twice, at those dates.

Eighth Cross-Int'y. Answer:

The stakes, where cedar could be obtained, were made of it. They were always stout stakes, some three or four feet in length, and after being blazed, marked with the number of the mile either in pencil or cut into them.

Ninth Cross-Int'y. Answer:

My connection with the colony ceased in 1845, about this time or soon after. I knew two surveyors besides Hunt who had been put at work by me, to have been put at work by Gen'l Mercer, but particulars in relation to the colony after my connection had ceased I do not know.

Tenth Cross-Int'y. Answer:

There were threats of violence, but none was actually used.
290 These emanated from gatherings of the people of Red River and Lamar counties, held at two several times. The names of these I do not know; I only know that Colonel Jim Borland, of Lamar county, himself told me that he was appointed chairman of a committee to execute and carry out the resolutions of the last meeting, but having fully satisfied himself that the spirit of the meeting was wrong, he had used his influence to quiet it. These resolutions declared that the surveying parties must be scattered, the instruments destroyed, and the agent put across Red River, out of Texas. Nothing more serious, however, than some delay in continuing the survey occurred.

Eleventh Cross-Int'y. Answer:

I think that all I know being stated in answer to foregoing interrogatory, as fully answers this as I can; I, therefore, refer to it as my answer to this.

Twelfth Cross-Int'y. Answer:

No; I do not know whether any of the stakes were destroyed or not. When the line ran through timber, it was chopped out and the trees blazed on either side of it, and, whether in timber or prairie, a stake, well marked with the number of the mile, was placed
291 at the end of each mile.

Thirteenth Cross-Int'y. Answer:

I was the local agent of General Mercer, exercising general supervision over his interests in the colony. The names of the parties settling cannot now be recalled by me, save the heads of three families, one Thacker Vivian and his two sons over 17 years old, and one Dameson, who was near the Sabine River. In conjunction with Dr. Rowlett and T. C. Bean, I issued certificates to over one hundred families, and verified the statement filed among the govern-

ment archives under oath, an authenticated copy of which is now before me; and I now mark on the back thereof the initials of J. P. P., and on which I have written my name and which I now make a part hereof.

Fourteenth Cross-Int'y. Answer:

Many of the queries herein I cannot now, nor could I at any time, have answered. I rarely if ever knew where the colonists came from, or what induced such to come to the colony. The first that came selected grounds in the northeastern part of the colony, east of the Sabine River. They built under contract with us their own cabins, brought their own arms, but a large supply of ammunition was stored
292 ready for distribution, bought by General Mercer. I presume the colonists came at the solicitations of the colony agents elsewhere, and because land could then be had without price. After I had ceased to be the agent I never entered the colony, save, perhaps, when riding through some portion of it when on a journey.

Fifteenth Cross-Int'y. Answer:

The contract required Mercer to run and mark the boundary lines, to subdivide into sections the lands, and in settling colonists to reserve and protect every alternate section for the Republic; to see that every settler or head of a family was properly armed, and to keep on hand a supply of ammunition, for distribution in case of need; to give to each head of a family not less than one hundred and sixty acres, and not more six hundred and forty acres. The contract defined what was meant by a family, and made a title from the government conditioned upon a residence for a term of years and the cultivation of a specific quantity of land—all of which was required of the colonists. Whether any ever acquired a complete title, I do not know. I lost sight of the affairs of the colony after leaving the agency.

293 Sixteenth Cross-Int'y. Answer:

Reports in writing were constantly made to Gen'l Mercer of everything connected with my operations. During my time one report of settlers was made under oath, to which I have referred in a previous answer. It is among the archives of the government.

Seventeenth Cross-Int'y. Answer:

I think my answer to cross-interrogatory No. 10 is full and complete as an answer to this, and refer to it as my answer hereto.

Eighteenth Cross-Int'y. Answer:

I did not visit the colony after my connection with it ceased, and know nothing of the settlers save during the years of my connection, nor do I know how rapidly the population of other parts of Texas increased at that time.

Nineteenth Cross-Int'y. Answer:

The line from Red River south is an arbitrary one, so also is the one running east and again south. These, to persons well acquainted

with the country, would be approximately ascertained without survey. A point opposite to the mouth of Cedar Creek is a natural mark. From the language of the contract when defining the boundaries of the grant to Mercer after running on east line south sixty-five
294 miles, the line is required then to go "by a straight course to a point on the Rio Trinidad, or River Trinity, on the bank thereof opposite the lower or southern bank of Cedar Creek," which creek must have entered Trinity River from the west, "thence across the River Trinity to said bank of Cedar Creek," which sufficiently designated which of several Cedar Creeks, if such there were, was meant. So also are Aquilla Creek and the Brazos River natural boundaries. I only know the Cedar Creek from reputation. I was never there.

Twentieth Cross-Int'y. Answer:

None. I am not, nor do I know who are.

Twenty-first Cross-Int'y. Answer:

I have so heard. I resided in Bonham in 1848. I left there early in 1849, and do not know anything of the general sentiment there, nor do I know anything of the acts of Mercer or his associates at that time.

Twenty-second Cross-Int'y. Answer:

I cannot remember any of the names of settlers save Thacker Vivian, his wife and daughter, his two sons, and one Dameron, on or near the head waters of the Sabine River.

P. J. PILLANS.

Sworn to and subscribed before me.

THO. T. SMITH, *N. P., J. C.*

295 STATE OF KENTUCKY, Jefferson County, } *ss.*

I, Thomas T. Smith, a notary public in and for said county and State aforesaid, duly commissioned by the governor thereof, and qualified and acting as such, do certify that under the agreement hereto attached (by which commission was dispensed with), and under the interrogatories and cross-interrogatories and exhibits hereto annexed, I caused T. J. Pillans to come before me as a witness for the complainant, on the 24th day of May, 1880, at my office, in the city of Louisville, Ky., in the suit in equity now pending in the Circuit Court of the United States for the fifth circuit and western district of Texas, at Austin, wherein William Preston, trustee, or George Hancock's devisee, is complainant, and W. C. Walsh, Commissioner of the General Land Office of Texas, is defendant, the witness being a resident of the State of Florida, of about the age of 64 years, and personally known to me, who, after being duly sworn by me to speak the truth, the whole and but the truth, proceeded and gave the foregoing deposition, which was reduced to writing by me in his presence, and the same was read by me to him and he signed the same in my presence.

The exhibits herein referred to are hereto annexed and certified by myself as exhibits.

Witness my hand and seal of office, at the city of Louisville,
296 in the State of Kentucky, this the 29th day of May, 1880.

[L. S.] THO. P. SMITH, *Not. Pub.*,
Jefferson County, Ky.

Fee for deposition, certifying exhibits, certs., and seal, $20; paid by complainant, 29 May, 1880.

THO. SMITH, *Not. Pub.*,
Jeff. County, Ky.

Exhibit to Deposition of P. J. Pillons.

HOUSTON, TEXAS, Jan'y 17th, 1845.

The second semi-annual report of the Texas Association to the Secretary of State of the Republic of Texas, made in conformity to the provisions of an agreement bearing date the 29th of January, 1844, between the Republic of Texas, acting by his excellency Sam Houston, President thereof, and Charles Fenton Mercer and such associates as he might choose.

The "Texas Association" is the "common name or title" assumed by the grantee, C. F. Mercer, and his associates, on
297 the 8th of May, 1844, under the contract with the Republic of Texas of the 29th of January next preceding, and the annexed list furnishes "the names, and opposite to them the number of shares of the stock or property" of the association held on the 1st day of the present month, by himself and his associates respectively, with the residence of the shareholders:

Names and abode.	Whence originally.	No. of shares.
C. F. Mercer, Tallahassee, Florida	Virginia	54½ shares.
D. C. Rowlett, near Brenham, Texas	Virginia	3 do.
E. C. Cabell, Tallahassee, Florida	Virginia	6 do.
Rich'd Birchett.....do.....do	Virginia	3 do.
John R. Cooke, Richmond, Virginia	Virginia	5 do.
B. F. Whitener, near Tallahassee, Florida	South Carolina	3 do.
Rev. N. McBride, near Quincy, Florida	North Caronlia	5 do.
Gen'l C. H. Dupont, at Quincy, Florida	South Carolina	2 do.
James B. Gamble, at Tallahassee, Florida	Virginia	2 do.
G. W. Anderson, at Jonesville, Kentucky	Kentucky	1 sh.
Dr. L. P. Gandell, at Louisville, Kentucky	Tennessee	1 do.
Dr. A. H. Garnell, Loritto, Essex Co., Virginia	Virginia	1 do.
Gen. T. Brown, at Tallahassee, Florida	Virginia	1 do.
N. P. Bemis, at.....do.....do	Virginia	1 do.
Robert White, at.....do.....do	N. Carolina	1 do.
Maj. Camp, Marshal y F^{a}, at Tallahassee	Virginia	1 do.
Benj'n C. Lewis, at Tallahassee, Florida	Virginia	1 do.
E. G. Booth.....do.....do	Virginia	1 do.
Dr. W. N. Hayward...do.....do	Maryland	1 do.
R. S. Hayward.....do.....do	Maryland	1 do.
R. & H. Larimer.....do.....do	S. Carolina	1 do.
H. L. Rutgers.....do.....do	New York	1 do.
Theo. Duvall.....do.....do	Kentucky	1 do.
Jacob Elliott, Bowling Green, Kentucky	New York	⅘ of one.
298 Total number of shares		100

The preceding list, among other shares, comprehends forty which, by agreement with his associates, the original contractor and grantee, C. F. Mercer, bound himself to his associates, severally, by separate written contracts, to sell for the purpose of raising the necessary funds to defray the expenses of surveyors and agents. By their sale he has produced 4,000 dollars per annum for the five years allowed by his contract to complete the colonization of the lands described therein.

By his several contracts with his associates, he is constituted chief agent, without compensation or salary, of the "Texas Association," with very ample power to complete its objects in a manner highly beneficial to the colonists and to the Republic of Texas.

For this purpose he now makes his third visit to Texas. He has constituted Doctor Daniel Rowlett his sub-agent with equal power to supply his place in his necessary absence, and, in case of his own death or incapacity, is authorized to become his successor in the chief agency of the "Texas Association," and to fix his salary and prescribe his duties.

299 Two bodies of surveyors were engaged to act under the superintendence and instructions of Doctor Rowlett and Capt. P. J. Pillons, in completing the surveys then in progress, of the outlines of the lands set apart for colonization by this contract, and in sectionizing the vacant lands preparatory to the report to be made on the 1st of May next. On the 1st of July there were on the grant 109 emigrant families. In testimony of the preceding statements I have hereunto set my name as the original grantee and chief agent of the Texas Association, on the 17th day of January, eighteen hundred and forty-five.

C. F. MERCER,
Original Grantee, Chief Agent of T. A.

STATE OF TEXAS,
Department of State. }

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing two and a quarter pages are a true and correct transcript of the "second semi-annual report of the Texas Association," bearing date of January 17th, 1845, as filed in this department.

In testimony whereof, I have hereunto signed my name and cause the seal of the Department of State to be affixed at the city of Austin, this the 11th day of February, A. D. 1874.

[L. S.] A. W. DE BERRY,
Secretary of State.

300 The second exhibit referred to in and made part of the answer of P. J. Pillons, is a certified copy of the articles of agreement between C. F. Mercer and the heads of emigrant families, signed by D. Rowlett, P. J. Pillons and Thomas C. Bean, and is iden-

tical with the articles of agreement before read in evidence, and which has heretofore been copied in this record on pages 167 to 175.

And complainant also produced and read upon the hearing the deposition of Theodore S. Garnett, which are as follows:

Interrogatories to Theodore S. Garnett.

In the Circuit Court of the U. S. for the Fifth Circuit, District of Western Texas, at Austin.

George Hancock, complainant, v. J. J. Groos, Land Commissioner, defendant. } Interrogatories to witness for complainant.

301 Interrogatories propounded by the complainant, William Preston, to R. T. Birchett, Theodore Garnett, Alfred Garnett, and others, witnesses in his behalf herein, and answered by each of said witnesses upon oath.

First Interrogatory:

State your name, age, and occupation, your present and former places of residence, and your former profession; any other you have pursued.

Second Interrogatory:

Did you or not know Charles Fenton Mercer? If yea, for how long a time and with what degree of intimacy? Is he alive or dead, and if dead, when did he die? Do you or not know his handwriting?

Third Interrogatory:

Did you have any knowledge of the "Mercer Colony" enterprise of Charles Fenton Mercer under his contract with the Republic of Texas? If yea, say you have, state from what time that knowledge dates, how it was acquired, and what, if any, were your opportunities for accurate information. State whether you were in anywise connected with said colonization scheme or with the Texas Association, and if so, how and at what earliest date, and how long
302 and in what way. Please give the particulars fully so far as you may know concerning the organization and history of the Texas Association.

Fourth Interrogatory:

State whether or not Charles Fenton Mercer and the Texas Association ever surveyed or attempted to survey, or made any effort to survey, the boundaries of the land set apart and reserved in the said contract of colonization. Did said Mercer or the Texas Association or their agents ever meet with obstructions from the officers of the State of Texas or from any turbulent and lawless men prior to the 29th January, 1849, or at any other time or from any other cause,

so as to interfere with the surveying or proper attention to the colony lands? If so, state when, where, and how, and the causes.

Fifth Interrogatory:

Do you know whether a map of the Mercer Colony was prepared by Mercer or his surveyors? If so, when *when* was it prepared; were copies of it distributed or not; was the map dated, and if so, what date did it bear? State whether you have ever seen such a map or a copy of it and when and where; give the date of your first seeing such a map as nearly as you can. If you have a copy
303 of such map please file it, mark it for identification, and make it part of your answer to this interrogatory, and give its history and an account of its custody and all other particulars as fully as you can.

Sixth Interrogatory:

Did or did not Charles Fenton Mercer and his associates ever introduce and settle any emigrants or colonists within the limits and boundaries of Mercer Colony as reserved and set forth in the colony contract of 29 January, 1844, or make any effort or endeavor to introduce any colonists, emigrants, or families into said Mercer Colony? If yea, state what number of emigrants or colonists were so introduced, and what efforts or endeavors were made by him or the Texas Association to do so and to fulfil the provisions of the said contract, and also state what obstacles and impediments, if any, were interposed, or impeded his or their fulfillment of the same.

Seventh Interrogatory:

Examine the paper now shown you and made part of this interrogatory, it being an authenticated copy from the office of the Secretary of State of Texas, of a letter dated *Tallahassee, Florida, December* 31, 1845, addressed by Charles F. Mercer to the Hon. Secretary of State of the Republic of Texas. State whether you
304 ever saw any of the persons, surveyors, engineers, and contractors therein mentioned at work within the limits of the Mercer Colony grant. If so, whom did you see, when and where? Give all the facts and circumstances as to how you were there, if at all, and what was done or being done, and by whom and how. State whether the paper just referred to was or was not printed at the time and distributed by Charles F. Mercer among the stockholders of the Texas Association and others as a circular.

Have you or not ever seen a printed copy of said paper?

Eighth Interrogatory:

Do you know or can you set forth any other matter or thing or file any paper or copy which may be a benefit or advantage to the parties at issue in this cause, or either them, or that may be mateareal to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in

your answer hereto, and more particularly give such facts as to the history and management of the Texas Association and the prosecution of its claim as may be known to you.

WM. PRESTON,
JOHN MASON BROWN,
HANCOCK, WEST & NORTH,
Compl't's Solicitors.

305 The paper referred to in the 7th interrogatory and made a part thereof is as follows:

Gen. C. F. Mercer's Letter.

TALLAHASSEE, FLORIDA, December 31, 1845.

To the Hon. Secretary of State of the Republic of Texas.

The undersigned, agent of the Texas Association, for himself and his associates, under the contract between his excellency Sam Houston, President of the Republic of Texas, and acting in behalf thereof and himself and "such associates as he might choose," bearing date on the 29th of January, 1844, submits to the Secretary of State according to a provision of that contract the following statement, being the fourth that he has communicated since the above date.

The association united under the above common name, chosen by them and the undersigned, are at present as follows, and their respective interests are as herein set forth:

Names of associates.	Places of abode.	No. of shares each.
Ed. Carrington Cabel...	Tallahassee, Florida.....	6
Richard T. Birchett.....	" "	3
Henry S. Rutgers.	" "	1
306 Nath'l P. Bemis..	" "	1
Wm. R. Howard and J. H. Randolph....	" "	1
Edwin G. Booth, of Nansemond Co., Va.	Black & White's P. O.....	1
Thomas Brown and James T. Archer.....	Tallahassee, Florida.	1
Benjamin C. Lewis.....	" "	1
A. E. Garnett, of..... and Ed. M. Garnett, of	Loretto, Essex Co., Va... Leon Co., Florida.....	1
John G. Camp.....	Tallahassee, Florida.	1
P. W. White.....	Quincy, Florida.....	1
Charles H. Dupont.....	" "	3
Benjamin F. Whitner.	Leon Co., Florida.....	3
Samuel T. Bailey.....	Macon, Georgia	2
Asa B. Clark.....	Tallahassee, Florida.....	1
T. E. Lindenberger and Wm. H. Brodie.....	New Orleans, La.....	1
J. H. T. Lorimer.....	Leon Co., Florida.....	1

Names of associates.	Places of abode.	No. of shares each.
G. Washington Anderson	Louisville, Kentucky	1
Lunsford P. Yandell	" "	1
James Craik	" "	1
Francis Griffin, foot of	Island 85, Mississippi	1
Robt. and Richard Hayward	Leon Co., Florida	1
Jacob Elliott	Elizabethtown, Ky	$\frac{4}{5}$
C. F. Mercer, original grantee	Tallahassee, Florida	$59\frac{1}{5}$
Forfeited shares unsold, the property of the association		6
Total stock of the association		100 shares.

Of the above shares certificates have been issued but for 34 shares.

307 No certificates have been issued or sold by the original grantee for his exclusive benefit.

On the shares sold at $500 each to create a fund to defray the expenses of colonization all the dues have been paid except 400 dollars, and that sum is confidently expected by the first day of May, 1846.

The greatest difficulty encountered by the association has arisen from the impediments to the survey and subdivision of the granted lands set apart for colonization. Funds for this purpose have never been wanted. Large deposits in New Orleans have long awaited drafts for surveying. Those impediments will be noticed hereafter in this report more particularly.

Several of the associates who were among the first to unite with the undersigned in forming the "Texas Association" have found it inconvenient to pay the several installments required of them by their terms of association. Their shares have been either not issued, or sold or retained, as forfeited to the association for future use.

The last contract made by the undersigned with T. Claxton Taylor, a civil engineer and practical surveyor, recommended in the last annual report of Col. Thomas Blake, Commissioner of the General Land Office of the United States, and now a contractor with

308 the Federal Government for sectionizing the public lands of Louisiana, requires him to be paid to the extent of six thousand dollars, or twelve shares of the Texas Association, at the rate of two dollars per mile for every mile necessary to be run and marked, to lay off the lands to be colonized into townships of six miles square, and sectionize them in such manner that every section, half or quarter section, may be readily found. To the payment of the claims of Mr. Taylor, who is now engaged in the execution of his contract, will be applied the forfeited and unsold shares. Any deficiency that may remain will be provided for out of the separate stock of the undersigned. Out of which will also hereafter be provided the compensation of those sub-agents who may be engaged or

have been in the service of the association for a compensation promised in stock. The undersigned will be repaid by the shares sold.

The substitution of shares of stock for money was insisted upon by the last contractor, Mr. Taylor, against the wishes of the undersigned, who was not desirous to part with his private and separate stock. But for the association it is a desirable substitution, since it creates in the surveyor engaged for all the surveying not hitherto contracted for and obvious and controlling interest in the
309 faithful and diligent discharge of his duty by ascertaining, when practicable, the limits of all legal locations prior to the date of the contract of January 29, 1844, and carefully avoiding any interference with all such locations. It will, also, be his interest, as one of the Texas Association, to perform correctly his labors in the field and to return accurate maps to the surveyor's office of the sectionized lands and of the entire tract set apart for colonization by the above contract.

The undersigned, being required by his several contracts with his associates to report semi-annually to the Secretary of State, or other proper officer of the Texas government, other particulars not required of him by the contract of January 29, 1844, and yet such as may be of interest to that government, begs leave to make this report, like his last, subserve both purposes. Accordingly he proceeds to state that prior to May 1, 1845, by which period he was required by his contract with the Republic of Texas to introduce and settle 100 families on the lands set apart for colonization by the contract of January 29, 1844, "The Texas Association" had introduced and settled more than 200 families exclusively from the United States. To this date it believed that no foreigner from Europe, or any
310 person who has ever lived out of the United States, has constituted an *associate* or a *colonist* of the association formed under the last named contract; although the contrary has been charged.

Early in May last, Doctor Daniel Rowlett, a sub-agent of the association, had proceeded as far as 119 families in his census of the colony, to which the Texan Congress has given, without his *without his* co-operation or knowledge at the time, the name of the undersigned. Dr. R. has also taken notes of hand of that number for the fees of survey charged the several emigrant families, to each of whom a certificate of title was contemporaneously issued, in which the date of the arrival of each family in the colony is correctly stated, and from each family, by another instrument of writing, an obligation was exacted to protect the lands of the association, and the reserved alternate sections of the Republic of Texas, from waste; to sell no spirituous liquor; to supply no arms or ammunition to the Indians; and to furnish a value of five dollars in money, materials or labor, for the construction of school-houses whenever demanded. In return for these concessions, 320 acres of land was assured to each family, instead of the minimum quantity of 160 acres.

It was found that many of the male emigrants above seven-
311 teen years had more than one rifle; that all were armed;
and 1,150 pounds of ammunition had been received by the sub-agent from the undersigned, by the way of New Orlearns and Red River, and stored in a place of safety, as convenient to the colonists as could be well provided. In fine, that every obligation of the undersigned and the Texas Association, of which he is the agent, had been duly fulfilled.

Dr. Rowlett had been compelled by bad weather, the scarcity of provisions, and the very large party which accompanied him in May through part of the colony, to return home without proceeding further in taking a census of the colony; but when the undersigned left Texas, on the 13th of June last, Dr. Rowlett was about to renew his efforts to complete it; and reported to the undersigned that the colonial families introduced and settled at that date amounted to more than two hundred and twenty.

The undersigned confidently believes that this number has been since extended, by the arrival of other emigrants, to more than twice that number, so as to furnish a well-grounded expectation
that by the end of the ensuing month, when the obligations of
312 the Texas Association, under the contract of January, 1844,
required two hundred and fifty families of emigrants in the Mercer Colony, there will be five hundred families.

Various causes have conspired to promote emigration to the portion of Texas comprehended in the above contract. The undersigned, in the prosecution of his duty as chief agent of the Texas Association, has made seven voyages by sea, travelled more than 8,500 miles by land, including journeys of 1,300 miles on horseback through the colonial lands and near the frontiers of Texas. He has published more than 2,000 handbills; had 1,100 maps lithographed of the colonial lands; advertised the terms of emigration in more than twenty newspapers, printed in Arkansas, Missouri, Illinois, Indiana, Ohio, Virginia, Florida, New York and the District of Columbia; and carried on an extensive correspondence throughout the United States, diligently devoting two years of his life to the fulfillment of his contract with the Texas government and his duty as chief agent of the Texas Association.

He has been much aided in his unceasing labors by the joint resolution of the two houses of the Congress of Texas, approved in February, 1845, by President Jones, "to establish the limits of the
Mercer Colony," and the knowledge widely diffused of the
313 fact that he has promptly complied with its requirement. He
was further assisted by the calumnies against the contract, which he diligently and promptly refuted in the most public manner to the satisfaction of all unprejudiced minds. Nor has the ordinance of the last Texas convention been inoperative in promoting emigration to the colony. In this act of extraordinary legislation the undersigned has seen nothing to regret, while the assurance which it extends to the colonists introduced by the Texas Association and other colo-

nization contractors, of a little of the lands promised by them to an extent even beyond the actual engagements of the contractors, should they choose to extend them to twice the promised quantity, could not fail to favor emigration, and was doubtless intended for that purpose by the convention. The very term "ordinance," which distinguishes this act of the convention from the constitution which accompanied it, is of ancient origin in the proceedings of several States, it is believed, as well as of Virginia, and of the confederation of the United States which preceded the present general government. In the usage of the former, however, it has given no other force to the regulations which it embraces than that of any ordinary act of legislation under an organized constitutional government.
314 In the acts of the confederation it was applied to a single measure, the one of great magnitude, the ordinance of 1787, relative to the public lands of the United States under the Virginia constitution of 1776, as well as the United States constitution of 1789, both governments have altered, amended, or repealed, in whole or in part, the provisions of acts sanctioned by the application of term "ordinance." But if that of the late Texas convention be regarded as of higher dignity, and be deemed incapable of modification or repeal by a future legislation from the acts of which it is believed to be distinguishable but by name, except in the suggestion thrown out by the convention in the preamble of the ordinance, that all colonization contracts made by the President of Texas are unconstitutional, the Texas Association can discover no just cause of complaint. But to obviate this, the convention, in condescending to furnish the foundation of their belief that all such contracts are unconstitutional, has rendered this sentiment altogether harmless. For by a report, almost contemporaneous with the ordinance, from the Commissioner of the General Land Office of Texas, as well as by a prior letter of the Texan minister at the city of Washington, to the Secretary of State of the United States of America, it appears that subsequent
315 to the date of the very last of those colonization contracts, all of which have been recognized or publicly noticed by the legislature of the Republic of Texas, and were known, therefore, to exist, the quantity of unlocated and unappropriated lands in Texas exceeds by many millions of acres any possible legal claims of the "citizen soldiers" or creditors of the Republic previous to those contracts, the most extensive of which had its origin in January, 1841. This contract was greatly extended in January, 1843, by a special act of the Congress of Texas, which at the same time authorized the purchase of the alternate sections reserved to the Republic at twelve dollars each. The succeeding Congress revoked the power of the President to make further colonization contracts, but that of January last, notwithstanding this inhibition to the President, granted to two foreign contractors an extension of time, and to one of them additional privileges.

But supposing the soldiers and creditors of the Republic, at the date of the first of those contracts, or afterwards, to have had "pre-

viously subsisting claims" to the unlocated and unappropriated lands of Texas, to an extent much greater than any rational estimate can swell them at present, the Texas Association cannot perceive that any subsisting or expired law of Texas gives, or at any time
316 gave, to them legal priority to the specified grants of the Republic for colonization or any other purpose. If those claims interfere with the special grants subsequently made for the augmentation of the population and revenue of the Republic, they equally clash with the appropriation of lands for education or the sale of lands to private citizens; and that very assurance of any quantity of land, not exceeding 640 acres to each emigrant family, introduced and settled by those very contractors, which the ordinance in question has not scrupled to give, limited only by the discretion of the contractors.

And how stand the relative rights of those soldiers and creditors whom the preamble of the ordinance is solicitous to protect against the claims of the colonization contractors, though not, it seems, against those of the colonists themselves? Those soldiers are scattered over Texas; the creditors over Europe and the United States. They constituted very distinct classes of persons. Their rights to lands are not contemporaneous in their origin, not founded upon the same laws, nor of equal dignity. Those of the latter class ceased with the late extra session of the Texas Congress, who repealed the authority previously granted to the creditor to convert his
317 bonds or notes into land scrip, and locate that upon the unappropriated public domain. If privity in the date of the scrip or certificates of land claims excluded such as are of subsequent date, then the "citizen soldier" may invalidate the claims of the creditors, or the creditors shut out the subsequently-issued certificates of the soldiers. But, in truth, there are in Texas public lands enough to satisfy the just claims of all, and the ordinance, coupled with that well-understood fact, demonstrated by the highest and best authority, renders its preamble harmless, and has undoubtedly done much to appease the inquietude of the contractors for colonization under repeated attacks upon their grants, and to impart security and confidence to the colonists themselves, that they will be permitted to hold and enjoy the lands promised to them and surveyed for them by those contractors.

The declaratory, which is the operative clause of the ordinance, does not alter, in any respect, the preceding laws of Texas, but conforms not only to them but to the laws of every State of the American Union; in no one of which, any more than in the country from whence the far greater part of their civil code is derived, would a fraudulent, illegal, or unconstitutional contract be regarded
318 as valid.

The Texas Association, well knowing the contract under which they act, is neither fraudulent, unconstitutional, nor illegal, and that all its conditions have so far been faithfully fulfilled, are proceeding with unabated zeal to execute it.

Causes less propitious than the acts of the convention and Congress of Texas, and equally beyond the control of the association, have, indeed, impeded the settlement of this colony. Of these impediments timely notice was given to the Executive Department, and its intervention requested for their removal.

The undersigned contracted in May last with Mr. B. J. Chambers for the survey of sixteen townships on the west side of the Trinity River, within the limits of his grant, and advanced him such sums of money as he required to commence and prosecute his labor in the field, with the assurance of such further supply as he might need. Mr. Chambers was shortly after deterred from prosecuting this labor by the declaration of an officer in the service of the Republic, placed on the frontier as a safeguard from Indian depredations, that he should not proceed; and if he did, in despite of threats, force
319 should be employed to arrest his progress. He was thus obstructed. Even those surveyors who had afforded facilities to the undersigned especially, and to his sub-agents, for the investigation of interfering and prior legal locations, have been since deterred from the performance of their duty, to the manifest injury and delay of the surveyors engaged to sectionize the lands reserved for colonization.

In the meantime he has prepared and caused to be translated into the German language along with an improved edition of the map of the colony herewith transmitted not only the terms of colonization advertised in the United States Gazettes, but a brief history of the political revolution so honorable to Texas, with the bill of rights prefixed to her excellent constitution, and a description of her climate, soil, and productions, all of which is designed to vindicate her moral and physical condition against gross misconstruction; and to recommend Texas to emigrants from Germany, a country to which the United States are so greatly indebted for a most valuable class of industrious, persevering, patient, and peaceable cultivators of the soil.

A desirable location has been made on the east bank of the Trinity, for a town to be connected by steamboat navigation
320 with the chief port of Texas on the Bay of Galveston. Its situation is a few miles below the junction of the eastern branch of the Trinity, called the Bois d'Arc, so as to avail the future navigation of all the water supplied by its chief tributaries. As accessories to the same end it is proposed to make application to first legislature which may set under the new constitution for permission, on terms mutually beneficial to the colonists and the Republic of Texas, to remove the chief obstructions to the navigation of the river from the upper border of the colonial grant to the landing near Fort Houston, to which steamboats have already ascended.

The contract by which the new surveys of the lands within the colonial boundary are to be paid for in stock of the association, and the provision for the reimbursement of this expense by moderate fees of survey from the colonists and for the construction of school-

houses, will have to be applied to the improvement of roads, and the reward of successful industry in agriculture and domestic manufactures, a part of the revenue of the association, from the sale of forty shares of its stock. It is intended to quicken this application, as the surveys shall go ahead of the *of the* growing current of
321 emigration, an event which is hoped a few months will accomplish. How far the resources of the association may prove adequate to the above ends, the annexed account of its receipts and disbursements for the two years now nearly expended, and of the revenue of that which will commence on the 30th of next month, will manifest.

Another object will prompt an application to the Legislature of Texas for such a modification of the contract of the undersigned as shall promote the interest of the colonists without infringing on the limitations of the ordinance of the convention, or the repealing act of Congress of January, 1844.

The above contract provides in its present form two sections of those alternately reserved to the Republic for every settlement of one hundred families to be applied to schools and pious uses. Such settlements, according to other provisions of the contract, which limit the operation of the contractors to the alternate sections only, unless they acquire by purchase, they cannot afford from their present means the right to settle those sections reserved to the Republic, will embrace a tract of fifteen miles square at least. They cannot be less than ten tho' all the alternate sections be purchased. If
322 more be bought, a settlement of 100 families will cover at least 200 sections and occupy a tract of country 14 miles square. But a school district should not exceed a square of four miles, or at most one of six, in order the younger pupils may not have too far to walk. The survey already made and those now continued provide for a distribution of the surveyed territory into townships six miles square, and sections of a mile square, or 640 acres; and it is believed that when the population shall admit of a reduction of each school district, such a space will be regarded as much too large for a single school.

It will be the pride, as it will be equally the duty and the interest of the Texas Association, to render the colony which they are just planting the most prosperous portion of the young and vigorous Commonwealth, of which it constitutes a part, and of their success in accomplishing this end they have no doubt if they be not unlawfully obstructed.

Respectfully submitted,

C. F. MERCER,

Original Grantee and Chief Agent of the Texas Association.

An Ordinance.—Whereas various contracts have been entered into by the President of the Republic of Texas with divers indi-
323 viduals with the expressed intention of colonizing an enormous amount of the public domain of Texas; and whereas it

is believed that said contracts are unconstitutional, and therefore void from beginning, and if carried out would operate as a monopoly of upwards of a million of acres of the public domain of Texas in the hands of a few individuals, when, in truth, the citizen soldiers and creditors of the Republic of Texas had, by the laws and constitution of said Republic, a clear and undisputable previously subsisting right to locate upon public domain thus attempted to be assigned to said contractors.

SECTION 1. Therefore it is hereby declared and ordained, That it shall be the duty of the attorney-general of this State or the district in which any portion of the colony may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors, &c., &c. (The bill provided for the protection of actual settlers.)

SECTION 2. Be it further ordained, That the legislature is hereby restrained from extending any contract for settling a colony and from relieving a contractor from the failure of the conditions or the forfeiture accruing from the non-compliance with the contract.

324 SECTION 3. And be it further ordained, That this ordinance shall be presented to the people for their adoption or rejection at the same time this constitution shall be presented to them, and the returns of the votes taken on this ordinance, &c., &c.

Adopted in convention 17th Aug., 1845.

THOMAS J. RUSK, *President.*

JAMES H. RAYMOND, *Secretary.*

The subjoined account between "The Texas Association" and C. F. Mercer, the chief agent, exhibits the disbursements and receipts of the agent from the date of his original contract to the 31st of December, 1845.

From Jan'y 29th, 1844, *to Dec. 31st*, 1845.

Paid to surveyors and sub-agents down to the 23d Nov. last, the date of the departure of the agent from New Orleans, since which further drafts may have been received there from the sub-agents, Dr. Daniel Rowlett or Col. Wheelock	$2977 50
Paid to printers and engravers for subscriptions to newspapers in Texas, 500 certificates of title, 500 notes of hand, 2,000 handbills, 1,150 lithographed maps	
325 of the colonial grant, 500 copies of the contracts of the original grantee with the Republic of Texas and his subsequent contract with copartners of the Texas Association, and one hundred and fifty certificates of stock on extra folio paper, 500 copies of a pamphlet in German including a political history of Texas, a statement of its present condition, the bill of rights prefixed to its constitution, an account of its	

climate, soil, and productions, and the terms of colonization offered by the association, together with the publication of their terms and the late ordinance of the Texas convention eight times in each of 20 newspapers of Florida, Arkansas, Missouri, Illinois, Indiana, Ohio, Virginia, New York, and Dist. of Col.		403 35
1844, '45. Paid for postages, stationery, commissions, exchange, endorsements, expenses, etc.		269 42
For a horse and equipments left at Columbus, near Washington, in Arkansas.		69 30
Feb'y, 1845. Fee to counsel in Texas.		50 00
May, 1844. Loan to an emigrant from Tall'hassee, Florida, secured by note		40 00
326 Mar., 1845. For 1,150 lbs. of ammunition stored in Bonham for col.		125 50
Dec. 31. For the expenses of the chief agent properly chargeable under his contract with his copartners to the association during 23 months from Jan'y 29th, 1844		1591 26
Add interest on the advances of the agent out of his private fortune, averaging $2,000 for 1½ years @ 6 per cent.		180 00
Total disbursements.		5706 33
Rec'd first installment upon 34 shares.	$3405	
" 2d do " 30 "	3000	
Total receipts, supposing the Ky. and Miss. stockholders to have paid up	6405	
Due on four shares for the second installment...	400	
" 1 do by contract for the 3rd installment	100	
Total sum to be relied on.		6905 00
Balance on hand or shortly to be collected after reimbursing all advances of the chief agent.		1198 67
To be sold six shares, on which to installments will be due		1200 00
Third installment on 39 shares due in October, 1846.....		3900 00
Fees of survey due from 500 families at $8 each.....		4000 00
Total resources for 1846 and to October, 1847.....		$10,298 67

C. F. MERCER.

ERRATA.—We notice in the annexed letter several omissions, etc. The first section of the ordinance [of which a part has been
327 omitted] shoul' read as follows:

SECTION 1. Therefore, it is hereby declared and ordained that it shall be the duty of the Attorney General of this State, or the district att'y of the district in which any portion of the colonies may be

situated, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contract with the President of Texas; and if upon such investigation it shall be found that any such contract was unconstitutional, illegal or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void: Provided, however, That all actual settlers under such contract shall be entitled to their quantity of land as colonists, not to exceed six hundred and forty acres to the head of a family and three hundred and twenty acres to a single man. And in all suits brought by or against any contractors or any person claiming under, by, or through them or either of them, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead; and the party may introduce testimony to prove the claim or title to have been forfeited as well for frauds or illegality or unconstitutionality, as on account of a failure to comply with the condition of the original grant or
328 contract; and any such plea shall be deemed good and valid in law in all such suit or suits in this State.

Add to the last sentence on the 7th page "for school and religious uses." In the last line for 10,000 read 10,398.67. In the last line but one of the first paragraph of the 3d page transpose the word "the" before the word "although." In the 2d page and 11th line of the 2d paragraph read "sectionize" for sectionizing.

THE STATE OF TEXAS,
Department of State.

I, A. W. De Berry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing 24¼ pages are a true and correct transcript of Gen. C. F. Mercer's letter, dated Tallahassee, Florida, December 31, 1845, as filed in this department. In testimony whereof I have hereunto signed my name, and caused the seal of the Department of State to be affixed, at the city of Austin, this the 21st day of February, A. D. 1874.

[L. S.] A. W. DE BERRY,
Secretary of State.

329 *Cross-Interrogatories to Theodore Garnett.*

In Circuit Court U. S., Western District of Texas, at Austin.

George Hancock
98. *vs.*
J. J. Groos.

The following cross-interrogatories are propounded by defendant to complainant's witness, R. T. Birchett, Theodore Garnett, and Alfred Garnett, viz:

Cross-Int. First:

Are either of you shareholders in the "Texas Association," and if so, when did you become such; how many shares do you own; how did you become the owner of them, and what have you paid on these shares, and to whom and when?

Cross-Int. Second:

Did either of you at any time ever own any share or shares in said "Texas Association"? If so, when did you acquire the same, from whom, and what did you pay for the same; how many shares did you own, and what disposition, if any, did you make of the same, and when and to whom did you dispose of the same?

Cross-Int. Third:

If in answer to direct interrogatory 4th you state that Mercer or said Texas Association ever had, or attempted to have, the boundary lines of said colony surveyed, and that obstructions were interposed to the work, state how you know these facts. Were you present? If you were, name the other persons that were present. Name the time and the place where this occurred. Name the surveyor or surveyors, and the chain carriers and all other persons engaged in said work. How much surveying, if any, was done? Where at and by whom and when was it done? Name the persons who obstructed or attempted to obstruct the surveying, if any. In what did those obsttuctions or attempted obstructions consist? Specify and particularize them, and give dates, names of persons engaged therein, and places where the same occurred, and your means of knowledge.

330

Cross-Int. Third:

If you have any knowledge of the map inquired about in direct interrogatory 5th, state particularly when and how you acquired that knowledge and from whom. Were the boundary lines as indicated in that map ever actually run and marked upon the ground? If so, how do you know that fact? When were they run and marked, and by what surveyor or surveyors? and name the other persons, if any, who assisted in any way in said surveying. Did you see the map made? If so, name the person that made it. When and where was it made, and from what field-notes or other data was it made? Do you not know that the boundary lines of the colony as shown by said map were never in fact actually run and marked upon the ground by any person, at any time, as indicated by said map?

331

Cross-Int. Fourth:

Name the present owners of shares in the Texas Association, and state the residence of each as far as you have a knowledge of them.

Cross-Int. Fifth:

If you are a shareholder in said Texas Association, when and where did said association hold its last meeting? What was the

object of the meeting, and what business was transacted at the same? Who were the officers of said association at that time? When were you last connected in any way, and in what way, with said association? When did you last vote or have a voice in any of its affairs, and on what occasion and in what particular matter? What number of shares, if any, did Charles Fenton Mercer own in said association at the time of his death? Who was the chief agent, if any one, of said association at the time of the death of said Mercer?

WILLSON & GAINES,
AND PEELER & MAXEY,
Sol's for Def't W. C. Walsh.

332 The depositions of Theodore S. Garnett, Senior, a witness produced on behalf of the complainant, and taken before me, John C. Baker, a notary public for the city of Norfolk, State of Va., by consent of parties, at my office, No. 78 Main street, in the city of Norfolk, State of Virginia, on this the 16th day of June, 1880, to be read as evidence on behalf of the complainant in a cause pending in the Circuit Court of the United States for the fifth circuit, district of Western Texas, at Austin, Texas, wherein George Hancock is complainant and J. J. Groos, Land Commissioner, &c., is defendant, upon interrogatories and cross-interrogatories hereto annexed.

Theodore S. Garnett, Senior, a witness of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the annexed direct and cross-interrogatories, in answer thereto does depose and say as follows:

First. To the first interrogatory he says:

Theodore S. Garnett; born at Elmwood, Essex county, Virginia, on the 18th day of November, 1812; reside now in the city of Norfolk, Virginia. Have been a civil engineer, and while thus engaged have resided temporarily in nine different States, viz: Vir-
333 ginia, Pennsylvania, North Carolina, South Carolina, Tennessee, Georgia, Alabama, Mississippi, and Florida, surveying, constructing, and managing railroads. Have since been engaged in farming, but am not now engaged in any business.

Second. To the second interrogatory he says:

Charles Fenton Mercer was my uncle. I knew him intimately from the time when I was a child, and corresponded with him from the time when I was eighteen years old until he died at the Episcopal High School, near Alexandria, in Fairfax county, Virginia, and was with him when he died, on the second of May, 1858. I know his handwriting. He represented the Loudon district in the United States House of Representatives for twenty-four consecutive years, and was for many years president of the Chesapeake and Ohio Canal Company. He was a gentleman of singular purity and integrity, and his character was above reproach. I here file a certified copy of

his last will, [marked Exhibit "A," by com'r , and herewith filed,] admitted to probate in Fairfax county, Virginia, in May, 1858. I qualified as his executor thereunder.

334 Third. To the third interrogatory he says:

Yes; I had knowledge of the Mercer Colony enterprise of Charles Fenton Mercer by my constant correspondence with him from the time that he made the contract with the Republic of Texas up to the time of his death; I was in no way connected with the colonization scheme or with the Texas Association except as the intimate friend and relation of Charles Fenton Mercer, and in that capacity and at his request, while he was ill at the Verandah Hotel, in the city of New Orleans, in March and April, 1847, I visited the colony; our correspondence was destroyed during the war of 1861 and 1865, but I have a copy "printed" of the contract of Charles Fenton Mercer with the Republic of Texas and with his associates in the Texas Association, with map attached, which he sent me soon after he issued it in May, 1845, which I herewith file and make a part of my answer to the fifth interrogatory. (The map and contract above spoken of is herewith filed, marked Exhibit "B.")

Fourth. To the fourth interrogatory he says:

I know the fact that Charles Fenton Mercer paid out large sums of money through his agents in Texas for surveying the colony lands, and when I was there, in March, 1847, Nicks Anderson, his
335 agent, and a surveyor whom I met at Anderson's, in Mercer's employment, informed me that there had been obstructions by one Smith, or his agents, in making the surveys; also, that Dr. Daniel Rowlett, an agent, and P. J. Pillans, a surveyor in Mercer's employment, whom I met, the one at Lexington, on Red River, and the other at Bonham, informed me that they had been obstructed in making the surveys.

Fifth. To the fifth interrogatory he says:

The map and contracts filed with this deposition (marked Exhibit "B") was sent to me by Charles Fenton Mercer in May, 1845, and I have retained it ever since; copies of it were distributed by Mercer to the stockholders of the Texas Association.

Sixth. To the sixth interrogatory he says:

Charles Fenton Mercer and his associates did introduce and settle many colonists within the limits and boundaries of the Mercer Colony as reserved and set forth in the colony contract of the 29th of January, 1844; when I visited the colony, in March, 1847, I saw many of the colonists and obtained from the agents, Nicks Anderson and Dr. Daniel Rowlett, lists of the colonists, showing a
336 number of families largely in excess of the number required by the terms of the contract up to that time; the lists were handed over to Mercer by me when I returned to New Orleans, in April, 1847, and I have never seen them since; I do not remember the ex-

act number; I have already stated, in answer to fourth interrogatory, that the agents and surveyors were obstructed in making the survey.

Seventh. To the seventh interrogatory he says:

The paper referred to in this interrogatory is now shown me. I have no copy of it, but I know the fact that General Mercer did prepare such a paper, and distributed it among the stockholders of the Texas Association and others. I do not remember of having seen a printed copy of said paper. In answer to the third and fourth interrogatories, I have stated the circumstances under which I visited the colony in March, 1847, and the employees of General Mercer whom I met there, and when and where I met them.

Eighth. To the eighth interrogatory he says:

337 I do not know and cannot set forth any other matter or thing or file any paper or copy which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this examination or the matters in question in this cause; but as bearing upon this matter I remember hearing from General Mercer that he *that he* had in 1852 transferred to Colonel George Hancock his entire remaining interest, viz., some forty-five shares, in the Texas Association, and Colonel Hancock then and there agreed that whatever benefit, either in money or land, should be realized by him from the said forty-five shares, should be divided as follows, one-half thereof to himself (Colonel Hancock) and the other half equally between my cousin, Mrs. Lucy B. Armstrong, and myself. With this understanding I wrote frequently to Colonel Hancock, and I now file a letter written by me to him November 24th, 1868, (letter herewith filed marked "Exhibit C.") I have no interest, neither legal nor equitable, in the stock of the said association.

Cross-Interrogatories.

First. To the first cross-interrogatory he says:

I am not.

338 Second. To the second cross-interrogatory he says:

I never owned any.

Third. To the third cross-interrogatory he says:

On my visit to the Mercer Colony, in 1847, I was informed by Nicks Anderson and a surveyor with him that they had been prevented from making further survey of the Mercer land by one Smith or his agents. Smith had been a Texas ranger. This occurred at Anderson's house, near Chambers Creek. I was informed by them and by Dr. Daniel Rowlett, an agent, and P. J. Pillans, a surveyor of General Mercer's, that threats of violence had been

repeatedly made against them, which had caused them to cease surveying.

Third (2d). To the third (2d) cross-interrogatory he says:

I have stated all that I know about the map; I do not know of my own knowledge when or where the boundary lines were run, but I have no doubt, from conversations had with the surveyors whom I have mentioned, that the lines were run by them, most probably by Pillons, and a map made from his or their field-notes. I do not know that the boundary lines were never actually run or marked; on the contrary, I have every reason to believe that they were.

Fourth. To the fourth cross-interrogatory he says:

I do not know them.

339 Fifth. To the fifth cross-interrogatory he says:

I am not a shareholder, and do not know when the last meeting was held; Charles Fenton Mercer owned no shares at his death; George Hancock was chief agent at that time; I knew him to be a gentleman of high standing and character.

And further this deponent sayeth not.

THEODORE GARNETT, SR.

STATE OF VIRGINIA, City of Norfolk, } to wit.

I hereby certify that on the 16th day of June, 1880, before me, John E. Baker, a notary public in and for the city of Norfolk and State of Virginia, at my office, No. 78 Main street, in the said city of Norfolk, State of Virginia, personally appeared before me, pursuant to agreement of all parties, the above named Theodore S. Garnett, Sr. No counsel appeared for either complainant or defendant, and the said Theodore S. Garnett, Senior, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the depositions hereto annexed.

And I further certify that the said deposition was then and there reduced to writing by me, and was, after it had been reduced to writing, subscribed by the witness.

340 And I further certify that the fee for taking said deposition ($5.00) has been paid to me by the complainant, and that the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal at the city of Norfolk, in the county of Norfolk and State of Virginia, this 16th day of June, A. D. 1880.

[L. S.] JOHN C. BAKER,
Notary Public.

Exhibit marked "A" to depositions of Theodore S. Garnett, sr., and filed and read on the hearing as a part thereof, is as follows:

I, Charles Fenton Mercer, now in Florida, and in the seventy-ninth year of my age, but in the possession of general health and with an unimpaired memory, do make and ordain this my last will, revoking all others, viz.: I give and devise all my estate of every description, whether personal or real, in possession at the time of my death or in expectancy or reversion, to my well-beloved nephew, Theodore S. Garnett, youngest son of my dear and lamented sister, Mary Elanor Garnett, late of Elmwood, in Essex county, Virginia. The only regret I have in making this will is that I shall leave so little to one to whom I in truth owe so much.

341 I constitute my said nephew my sole executor of this my will. Intending to leave Florida shortly to return to New York, I hope if we never meet again in this world we may thro' the mercy of God hereafter do so in that better world to which we are both hastening, tho' I trust many years of prosperity and happiness are reserved for him in this, and it will be long before he follows me.

Signed and written throughout by my own hand.

CHARLES FENTON MERCER.

Tallahassee, Florida, March 25th, 1857.

At a court of monthly sessions held for the county of Fairfax, at the court-house thereof, on the 17th day of May, 1858.

The last will and testament of Charles Fenton Mercer, deceased, was presented to the court, and there being no subscribing witnesses thereto, Henry W. Thomas and James M. McGuire were sworn and severally deposed that they are well acquainted with the testator's handwriting, and verily believe the said writing and the name thereto subscribed to be wholly written by the testator's own hand; whereupon the said writing is ordered to be recorded as the true last will and testament of the said Charles Fenton Mercer, deceased.

342 Teste: ALFRED MOSS, *C.*

A copy—teste:

F. D. RICHARDSON, *Clerk.*

Exhibit marked "B" to the foregoing depositions of Theodore S. Garnett, sr., and filed and read upon the hearing as a part thereof, is in four large folio pages, whereof the first contains a blank certificate of stock headed "The Texas Association," and identical in all respects with the certificate before read in evidence and heretofore copied in this record on pages 175 & 176; and the second page whereof contains a map of the Mercer Colony in Texas identical in all respects with the map before read in evidence and heretofore copied in this record on page 190½; and the third page whereof contains a blank form of the agreement between Charles F. Mercer and stockholders of the Texas Association identical in all respects with the agreement between said parties before read in evidence and heretofore copied in this record on pages 242 to 256; and the fourth

page whereof contains the contract of colonization between Charles F. Mercer and the President of the Republic of Texas identical in all respects with the contract of colonization between said parties before
343 read in evidence and heretofore copied in this record on pages 149 to 166.

Exhibit marked "C" in the foregoing depositions of Theodore S. Garnett, sr., and filed and read upon the hearing as a part thereof, is as follows:

CEDAR HILL, NEAR JUNCTION P. O., HANOVER, VA.,
Nov'r 24, 1868.

DEAR SIR: A short time before the war com'c'd I wrote to you proposing to make the same arrangement with you about the Texas property for my interest in it which you made with Wm. Armstrong in relation to his wife's interest. I received no reply to that letter, and since the surrender of Gen'l Lee at Appomattox C. H., the war, not yet ended, had assumed so many various phases that I despaired of accomplishing anything by correspondence or negotiations of any sort. Now that the Radicals have obtained the respite from annihilation which they aimed at in nominating Gen'l Grant, there may be comparative quiet for a short period, and in that interval of semi-peace I have thought it might be possible to get something for the above-mentioned interest.
344 I know that depends entirely on your own generosity, but as you made an arrang't before the war with Wm. Armstrong, by which my cousin, his wife, obtained something, I am encouraged to hope that you are willing, if able, to do as much for me. I need not tell you that I have suffered by the vile war in common with every respectable man in Va., and if you can conveniently, with your sense of justice, enable me to get something, anything, out of this Texas business, you will add another to the many obligations under which I am to you.

Your kindness to Gen'l Mercer I shall never cease to remember with gratitude. If any members of your family whom I know are with you, present me kindly to them, and in this my wife joins me, as also my brother Charles, who lives here with me.

Yr's truly and respec'lly,

THEODORE S. GARNETT.

GEORGE HANCOCK, ESQ.

And complainant also produced and read upon the hear-
345 ing the following deposition of Richard T. Birchett:

Deposition of R. T. Birchett.

In the Circuit Court of the U. S. for the Fifth Circuit, Dist. of Western Texas, at Austin.

George Hancock, complainant,
vs.
J. J. Groos, Land Comm'r, &c., defendant.

Be it known that on this the ninth day of June, A. D. 1880, that the paper purporting to be a true copy of the original agreement, dated March 9th, 1880, between Willson & Gaines and Peeler Maxey, solicitors for the defendant, and Hancock, West & North, solicitors for the complainant, in a cause in the U. S. Circuit Court for the Western District of Texas, at Austin, in equity sitting, in the case of George Hancock, complainant, *vs.* J. J. Groos, a copy of which is hereafter annexed and made a part hereof, marked Exhibit "A," and on this day at the request of the complainant, in pursuance of said authority, I caused to come before me at my office Richard T. Birchett, a citizen of Washington, D. C., personally well known to me, to testify in said cause on the interrogatories and cross-interrogatories exhibited to him; and I did, at the same time and place, fully
346 examine said witness under oath, he being of lawful age, and being first duly sworn by me touching annexed direct and cross-interrogatories, and said deponent did answer and state as follows, and that I did reduce his answers so taken to proper form, and did cause the same to be subscribed and sworn to before me by said witness; and I do certify under my hand and seal of office that said answers were sworn to and subscribed before me by said witness, which said answers, having been so taken as aforesaid, are now returned to be read in evidence in said suit, and the original interrogatories and cross-interrogatories are not returned herewith, as per said agreement, as complainant retains the same to take proofs of other witnesses; and I do further certify that neither of the parties litigant, nor their solicitors, attorneys, or counsellor, were present when I reduced the said answers to writing.

Witness my hand and notarial seal this day and date hereinbefore given.

[L. S.] THOMAS K. WALLACE,
Notary Public, District of Columbia.

347 In the U. S. Circuit Court, Western District of Texas, at Austin.

Geo. Hancock
No. 98. *vs.* In equity.
J. J. Groos.

It is agreed between the parties in this suit as follows:

1. The testimony of all witnesses shall be taken on written interrogatories and cross-interrogatories by any officer authorized by the

law of the State of Texas to take depositions, and the same officer, without regard to his residence or the residence of the witnesses, as may be desired by the party at whose instance the testimony is taken.

2. The testimony shall be taken in substantial conformity with the practice in the courts of Texas, and all mere irregularities or technical objections as to the manner of taking and return are waived, but no waiver as to competency or relevancy.

3. Interrogatories to be handed by one party to the other for crossing without the necessity of filing and notice.

4. The evidence may be taken with or without a commission, as either party may desire.

WILLSON & GAINES,
PEELER & MAXEY,
Sol's for Def't.
HANCOCK, WEST & NORTH,
Sol's for Compt.

March 9th, 1880.

A true copy of the original.

HANCOCK, WEST & NORTH.

A true copy of the copy.

THOMAS K. WALLACE.

Washington, D. C., June 9th, 1880.

348 In the Circuit Court of the U. S. for the Fifth Circuit, District of Western Texas, at Austin.

George Hancock, complainant,
No. 98. *vs.*
J. J. Groos, defendant.

Interrogatories to witnesses for complainant.

Interrogatories propounded by the complainant, William Preston, to R. T. Birchett, Theodore Garnett, Alfred Garnett, and others, witnesses in his behalf herein, and be answered by each of said witnesses upon oath.

1st. First Interrogatory:

State your name, age, and occupation, your present and former places of residence, and your former profession; any other you have pursued.

2nd. Second Interrogatory:

Did you or not know Charles Fenton Mercer? If yea, for how long a time and with what degree of intimacy? Is he alive or dead, and if dead, when did he die? Do you or not know his handwriting?

349 3rd. Third Interrogatory:

Did you have any knowledge of the "Mercer Colony" enterprise of Charles Fenton Mercer, under his contract with the Republic of Texas? If you say you have, state from what time that knowledge dates, how it was acquired, and what, if any, were your opportunities for accurate information. State whether you were in anywise connected with the said colonization scheme, or with the Texas Association, and if so how, and at what earliest date, and how long and in what way.

Please give the particulars fully so far *so far* as you may know concerning the organization and history of the Texas Association.

4th. Fourth Interrogatory:

State whether or not Charles Fenton Mercer and the Texas Association ever surveyed, or attempted to survey, or made any effort to survey the boundaries of the lands set apart and reserved in the said contract of colonization. Did said Mercer or the Texas Association, or their agents, ever meet with obstructions from the officers of the State of Texas, or from any turbulent and lawless men prior to the 29th January, 1849, or at any other time or from any other cause, so as to interfere with surveying or other proper attention to the colony lands? If so, state when, where and how, and the causes.

350 5th. Fifth Interrogatory:

Do you know whether a map of the Mercer Colony was prepared by Mercer or his surveyors? If so, when was it prepared; were copies of it distributed or not; was the map dated, and if so, what date did it bear? State whether you have ever seen such a map, or a copy of it, and when and where; give the date of your first seeing such a map, as nearly as you can.

If you have a copy of such a map, please file it, mark it for identification and make it part of your answer to this interrogatory and give its history and an account of its custody and all other particulars as fully as you can.

6th. Sixth Interrogatory:

Did or did not Charles Fenton Mercer and his associates ever introduce and settle any emigrants or colonists within the limits and boundaries of the Mercer Colony as reserved and set forth in the colony contract of 29 January, 1844, or make any effort or endeavor to introduce any colonists, emigrants or families into said Mercer's Colony? If yea, state what number of emigrants or colonists were so introduced, and what efforts or endeavors were made by him or the Texas Association to do so and to fulfil the provisions of
351 the said contract, and also state what obstacles and impediments, if any, were interposed, or impeded his and their fulfilment of the same.

7th. Seventh Interrogatory:

Examine the paper now shown you and made part of this interrogatory, it being an authenticated copy from the office of the Secretary of State of Texas of a letter dated *Tallahassee, Florida, December* 31, 1845, addressed by Charles F. Mercer to the Hon. Secretary of State of the Republic of Texas; state whether you ever saw any of the persons, surveyors, engineers, and contractors therein mentioned at work within the limits of the Mercer Colony and when. Give all the facts and circumstances as to how you were there, if at all, and what was done or being done, and by whom and how.

State whether the paper just referred to was or was not printed at the time and distributed by Charles F. Mercer among the stockholders of the Texas Association and others as a circular.

Have you or not ever seen a printed copy of said paper?

8th. Eighth Interrogatory:

Do you know or can you set forth any other matter or thing or file any paper or copy which may be a benefit or advantage
352 to the parties at issue in the cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause?

If yea, set forth the same fully and at large in your answer hereto, and more particularly give such facts as to the history and management of the Texas Association and the prosecution of its claim as may be known to you.

WM. PRESTON,
JOHN MASON BROWN,
HANCOCK, WEST & NORTH,
Compl't's Solicitors.

Answers by Richard T. Birchett.

1st Interrogatory:

My name is Richard T. Birchett; I was born at Petersburg, Virginia, on the 28th March, 1815; was educated for the legal profession, and in 1836 obtained a license to practice law in the courts of Virginia, and continued in the active practice of my profession until November, 1841, at which time I accepted the office of clerk of the Superior Court of Leon county, Tallahassee, Florida, and ex officio clerk of the Court of Appeals of the Territory of Florida; removed to Florida and qualified to said office on the 27th day of November, 1841. I continued to discharge said duties during the existence of the territorial government, and until the election of State
353 officials. In the fall of 1843 became a partner of the commission house at New Orleans of T. E. Lindenberger & Co. In 1846 became also a partner in the commission house of R. H. Berry & Co. at Tallahassee. In 1849 received the appointment of deputy collector of customs at the port of St. Mark's, Florida, and discharged the duties of that office until the summer of 1852, when

I resigned said office, and in September of that year located myself and family in the city of Washington, where I have resided to this date. Resumed the practice of my profession, and acted as agent for the prosecution of claims on locating in the city, and continued as such until February, 1861, at which time I accepted a clerkship in the Treasury Department, and have been from the last-named period up to the present date in the service of the U. S. Treasury Department.

2nd Interrogatory:

I first became personally acquainted with Charles Fenton Mercer at Tallahassee, Florida, in December, 1841, or January, 1842. He had been (and was at that time I think) cashier of the Union Bank of Florida. He was a Christian gentleman of captivating manners and address, possessed of a vast fund of information acquired by a faithful service in the legislature of his native State and of the House of Representatives of the United States. From a long
354 and intimate acquaintance with him I feel no hesitation in the expression of opinion that he was a gentleman of the "Virginia Old-school," of eminently spotless character and integrity. I was on as intimate terms with him as the differance of our respective ages warranted. I spent the last evening with him (at our boarding-house, Mrs. J. Taylor's) before he left this city for the place near Alexandria, Virginia, at which he shortly thereafter died. He knew his condition was hopeless, and that his death was certain within a very short time. I find by reference to Lanman's Dictionary of Congress, that General Mercer "was a member of Congress from 1817 to 1840. Died at Howard, near Alexandria, Virginia, May 4th, 1858."

I corresponded with Gen'l Mercer, and am familiar with his handwriting.

3rd Interrogatory:

I was one of the original stockholders in the Mercer Colony Association under General Mercer's contract of January 29th, 1844. A full statement of my connection and interest with the claim will be given in my answers to third and fourth of the cross-interrogatories.

4th Interrogatory:

I have no information or knowledge in relation to the surveys, other than that derived from others.

355 5th Interrogatory:

I believe that a map similar to the one here filed, marked "B" No. 1, was furnished to the original stockholders by General Mercer. I presume that I first saw the map when I received my certificate of stock from him. That certificate was lost with other papers in the storm of 1851, at St. Mark's, Florida, when my dwelling-house with furniture, all my papers, (private,) &c., was swept

away. The paper filed herewith, marked "B" No. 1, was received by me from George Hancock, the then chief agent of the association, and was surrendered by me to the present organization, and a certificate of new stock in lieu thereof has been issued in my favor. At my request the paper has been withdrawn from the archives of the association, and permission given me to file it as a part of my answer.

6th Interrogatory:

I never was in Texas, and therefore cannot state of my own knowledge the number of emigrants or colonists introduced by General Mercer within the limits and boundaries under his contract of January 29th, 1844. Any information I had on the subject was derived from him or others in relation to the introduction of colonists and obstructions to the surveys of the lands.

356 7th Interrogatory:

As well as my memory serves me, General Mercer, at a meeting of the original stockholders at Tallahassee, read to us a copy of the letter of 31 December, 1845, addressed by him to the Secretary of State of the Republic of Texas. It was printed about that time, and distributed, I think, among the stockholders and others. I am informed that one or more of said printed letters is or are in Tallahassee at this time. I have recently seen one of them at this city.

8th Interrogatory:

For the benefit of the parties interested in this cause I herewith file, as part of my answer hereto, the following papers: Original contract between George Hancock, chief agent, &c., and Thomas H. Duvall and George W. Paschal, dated 27th December, 1853. I am well acquainted with the handwriting of the parties, and know the signatures thereto and to the appended receipts to be genuine. "B" No. 2.

Office copy from letter-book of my letters of the 19th January, 1854, to George Hancock and to Thomas H. Duval, marked "B" No. 3 and "B" No. 4.

Copy of a letter from George Hancock, at Louisville, Kentucky, 30th August, 1869, addressed to E. C. Cabell, New York city;
357 the original letter transmitted to me for perusal and information, and returned by me after making this copy thereof, marked "B" No. 5.

Letter of Hon E. C. Cabell to George Hancock, dated at Tallahassee July 14, 1855, which I have been requested to file as part of my answer. I know it to be genuine. Marked "B" No. 6.

Letter of George Hancock, dated Louisville, May 22, 1854, and duly received by me, accompanying the certificate for three (3) shares of stock. Said certificate of stock is filed as Exhibit "B" No. 1, with my answer to 5th interrogatory. I am well acquainted with Hancock's handwriting. Said letter is marked "B" No. 7.

RICHARD T. BIRCHETT.

In further reply to the 8th interrogatory, I append herewith a paper, marked "B" No. 8, which I identify as being in the proper handwriting of Judge Thomas A. Duval, of Austin, Texas, although not signed by him. I recognize the handwriting.

RICHARD T. BIRCHETT.

358 In Circuit Court U. S., Western District of Texas, at Austin.

George Hancock
98. *vs.*
J. J. Groos.

The following cross-interrogatories are propounded by defendant to complainant's witness, R. T. Birchett, Theodore Garnett, and Alfred Garnett, viz:

Cross-Interrogatory 1:

Are either of you shareholders in the "Texas Association," and if so, when did you become such, how many shares do you own, how did you become the owner of them, and what have you paid on these shares, and to whom and when?

Cross-Interrogatory 2:

Did either of you at any time ever own any share or shares in said "Texas Association"? If so, when did you acquire the same, from whom, and what did you pay for the same, how many shares did you own, and what disposition, if any, did you make of the same, and where and to whom did you dispose of the same?

Cross-Interrogatory 3:

If in answer to direct interrogatory 4th you state that Mercer or the said Texas Association ever had, or attempted to have, the boundary lines of said colony surveyed, and that obstructions were interposed to the work, state how you know these facts. Were you present?

359 If you were, name the other persons that were present, name the time and the place where this occurred, name the surveyor or surveyors and the chain-carriers, and all other persons engaged in said work. How much surveying, if any, was done; whereat and by whom and when was it done? Name the persons who obstructed or attempted to obstruct the surveying, if any. In what did these obstructions or attempted obstructions consist? Specify and particularize them, and give dates, names of persons engaged therein and places where the same occurred, and your means of knowledge.

Cross-Interrogatory 3:

If you have any knowledge of the map inquired about in direct interrogatory 5th, state particularly when and how you acquired that knowledge and from whom. Were the boundary lines as indicated in that map ever actually run and marked upon the ground?

If so, how do you know that fact? When were they run and marked, and by what surveyor or surveyors? And name the other persons, if any, who assisted in any way in said surveying. Did you see the map made? If so, name the person that made it, when and where was it made, and from what field-notes or other data was it made.

Do you not know that the boundary lines of the colony as shown by said map were never, in fact, actually run and marked
360 upon the ground by any person at any time as indicated by said map?

Cross-Interrogatory 4:

Name the present owners of shares in the Texas Association, and state the residence of each, as far as you have a knowledge of them.

Cross-Interrogatory 5:

If you are a shareholder in said Texas Association, when and where did said association hold its last meeting? Which of the shareholders were present at said meeting; what was the object of the meeting, and what business was transacted at the same; who were the officers of said association at that time; when were you last connected in any way, and in what way, with said association? When did you last vote or have a voice in any of its affairs, and on what occasion and in what particular matter? What number of shares, if any, did Charles Fenton Mercer own in said association at the time of his death; who was the chief agent, if any one, of said association at the time of the death of said Mercer?

WILLSON & GAINES,
AND PEELER & MEXEY,
Sol's for Def't W. C. Walsh.

361 Answers by Richard T. Birchett to cross-interrogatories:

1st Interrogatory (cross):

I was one of the original stockholders, and received from General Mercer certificates for three (3) shares, which certificates were lost by me. I am stockholder in the present Texas Association, and hold certificates for twenty-seven (27) shares of the stock in same, issued under the rules and regulations of the present organization.

To avoid repetition I will as briefly as practicable give the following history of the Texas Association as well I know it, from its inception under the contract of January, 1844, to the present time.

General Mercer, on his return from Austin to Tallahassee, was exceedingly energetic in procuring persons of social standing and pecuniary means to become his associates in the carrying into execution the said contract. I have read carefully the copy of his letter of December 31, 1845, and believe that the names of the stockholders are correctly given, their interest in the grant, &c.

I was personally acquainted with all the original Florida stockholders. I know that he employed engineers and surveyors to make the required surveys, &c. I heard from himself, perhaps from others, that the surveyors were forced to abandon the work from apprehensions of personal violence, as a strong feeling had been cre-
362 ated and expressed against the grant. At this remote date it is most difficult to charges one's memory with the recollection of all the incidents connected with the grant, and with conversations with General Mercer relative thereto. I know that he visited Texas for the purpose of giving his personal attention and supervision to the work.

Whether he made more than one of such visits, or how many, I cannot state. I never lost faith in the binding force and validity of the grant, and paid General Mercer between 1844 and 1848 for my shares of stock, and received from him certificates for the same. I met General Mercer in the winter of 1852–'3 at the boarding-house of Mrs. Eliza Peyton in this city, where he and myself and family were boarders. In one of the many conversations had with him, he informed me that he had sold his lands in Kentucky, and that, feeling the infirmites of old age, he had also sold and transferred and assigned to George Hancock, of Louisville, Kentucky, all of his interest in the association, and had appointed him chief agent of the same, under the impression and belief that his action would be to the interest and benefit of the stockholders. He stated that his advanced age rendered him unequal to the proper and efficient discharge of the duties of chief agent, and that his selection and enlistment in
363 the service of the association of a younger and efficient agent would prove beneficial to the members of the association. I have also seen a paper in the proper handwriting of General Mercer, in which he admitted that he had sold and transferred all his interest in the Mercer Colony grant to George Hancock. This admission is contained in a paper dated Tallahassee, Florida, May 19, 1857, and signed by him. I know the paper and signature to same to be genuine. I do not attach it to my deposition, as it is the property of the association, and, as I understand, one of its archives, and is retained by its present chief agent. I know that General Mercer was at times during the winter of 1852–'3 in great pecuniary distress; that an annuity of two thousand dollars ($2,000) was procured for him through Hancock, it being obtained from the avails of his sale of land in Kentucky and of his interesst in the Mercer Colony to Hancock. A remittance having been made on account of his annuity through Mr. Palmer, the then president of the Merchant's Bank of New York, relieved him from his pecuniary embarrassment and enabled him to visit Europe, where he spent some three (3) or more years very pleasantly and comfortably, as I was informed by him after his return. He sailed from Philadelphia in the steamship Manchester on the 13th August, 1853.

364 2nd Cross-Interrogatory:

In answer to this cross-interrogatory I refer to my answers to cross-interrogatories Nos 1. and 3.

3d Cross-Interrogatory:

My answer to this cross-interrogatory and to 1st cross-interrogatory gives all the information I possess on the subjects inquired into, and to them I hereby refer and make them part of my answer to this cross-interrogatory.

3d Cross-Interrogatory:

After having been informed that George Hancock had entered upon the duties of chief agent, I entered into a correspondence with him, which resulted in my acceptance offer to have three (3) shares of new stock issued to me in lieu of the original certificates lost at St. Mark's, Florida, upon the payment by me of three hundred dollars ($300) in cash, which I duly paid, and received from him the three (3) certificates, filed in my answer to direct interrogatory No. 5 and marked "B" No. 1. After the death of George Hancock and the assumption of the duties of chief agent by Gen. Wm. Preston under the will of said Hancock, I surrendered to the present association the said certificates of stock and received in lieu thereof a certificate for twenty-seven (27) shares of stock under the new organization, the equivalent of the former certificate. I hold and am
365 the sole owner of said twenty-seven (27) shares.

I have never attended a meeting of the present association. General Wm. Preston I know to be the chief agent and president of the present Texas Association. I have received official notice of meetings to be held at the office of the company at Louisville. The last notice of a meeting, to be held on the 20th January, present year, was duly received by me, and I sent power of attorney to a friend to represent me and vote my stock. I have always believed that the justice of the claim would be finally admitted and recognized by the State of Texas, and that the outlay for years of a large sum, which was expended by General Mercer and his associates in the development of the resources and power of that State, would be returned to the stockholders with manifold interest and profit.

4th Cross-Interrogatory:

I do not know the names of the present owners of shares in the Texas Association. I believe C. E. Cabell, of St. Louis, Missouri, is the owner of fifty-four (54) shares of stock. The books of the association will doubtless afford the desired information.

5th Cross-Interrogatory:

I have no other information or knowledge in relation to the matters enquired into by this cross-interrogatory other than what has been given in my previous answers, and to which reference is hereby made.

RICHARD T. BIRCHETT.

366 The following are the exhibits referred to in the foregoing answers of the witness Richard T. Birchett, and appended thereto and read upon the hearing by the complainant:

Certificate of Stock in the Texas Association marked "B No. 1."

The first page of this certificate contains the agreement between Charles F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association, which is identical in form and wording with the articles of agreement heretofore produced and read by the complainant, (Rec., pages 242-256.)

The second page of said certificate contains the contract of colonization between Charles F. Mercer and Sam Houston, President of the Republic of Texas, acting for and in behalf of said Republic, which contract is identical in form and wording with the contract heretofore produced and read by the complainant, (Rec., pages 149 to 166.)

The third page of said certificate is in words and figures as follows:

80, 81, 82.

The Texas Association.

Share No. eighty, eighty-one, eighty-two.

This is to certify that R. T. Birchett is entitled to shares
367 No. 80, 81, 82, being three-hundredths part of the stock of the Texas Association, formed under the authority of the Republic of Texas, according to the terms of a contract or agreement for colonizing certain lands in Texas, made on the twenty-ninth day of January, eighteen hundred and forty-four, " between Sam Houston, President of the Republic of Texas, acting in behalf thereof, and Charles Fenton Mercer, and such associates as he may choose," which said contract is duly attested by Anson Jones, Secretary of State of the Republic, and the great seal thereof, and is in the words and figures of the printed copy hereto annexed, with the certificate appended of the Chief Clerk of the Department of State.

This share of stock is held subject to all the obligations, conditions, and limitations, and with all the rights, privileges, and immunities stipulated or expressed in the above contract and in the subsequent agreement between Charles Fenton Mercer, the original contractor, and the several associates he hath chosen, of which last agreement a printed copy is hereto annexed. These shares may be transferred or assigned by the subscription or indorsement of the original holder, R. T. Burchett, or of his legal representative, on notice of such subscription or indorsement being communicated to the said
368 Charles Fenton Mercer, or any person who shall succeed him as chief agent of the Texas Association; and the assignee and his legal representatives shall thereafter be substituted for and entitled to all the rights, privileges, and immunities, and be subject to

all the obligations, conditions, and limitations of the original holder of said share, except the same be superadded to or in any way modified by the terms of such assignment or transfer expressed in writing on the face of this certificate, and in such case attested by two or more witnesses, or before a notary of some city or corporation, and his certificate of the acknowledgment of said assignment or transfer subscribed thereto.

In testimony whereof the said Charles Fenton Mercer, original contractor with the Republic of Texas and chief agent of the "Texas Association," hath hereunto subscribed his name on the first day of January, A. D. eighteen hundred and fifty-four.

CHARLES FENTON MERCER,
By his Assignee & Trustee, Geo. Hancock.

GEO. HANCOCK,
Chief Agent of Texas Association.

The fourth page of said certificate contains a map of Mer-
369 cer's Colony identical in form and wording with the map of Mercer's Colony heretofore introduced in evidence by the complainant, (Rec. 190½.)

Agreement to prosecute Mercer contract, marked "B No. 2," and made part of the answers of Richard T. Burchett and read upon the hearing by complainant:

This agreement, made this 27th Dec'r, 1853, between the "Texas Association," representing the interests of Chas. Fenton Mercer and associates by their duly appointed trustee, George Hancock, on the one part, Thos. H. Duval and Geo. W. Paschal of the other part, witnesseth:

That the parties of the first part have employed the parties of the second part to aid in prosecuting the claim of the parties of the first part before the legislature or courts for their claims growing out of Mercer's Colonial Contract, and for services rendered and to be rendered the parties of the first part covenant and agree as follows:

1. To pay said Duval and said Paschal each the sum of five hundred dollars, as follows: in cash down to each the sum of two hundred and fifty dollars, and in 60 or 90 days from this date the further sum to each of two hundred and fifty dollars.

370 2. To pay all necessary actual expenses which may be incurred by said Paschal and said Duval in prosecuting said claim, such expenses to be incurred under the sanction and consent of said Hancock.

3. To pay jointly to said Paschal and Duval at the rate of 5 cents per acre for each acre of land certificates or an equivalent which said company shall obtain from the government of Texas.

4. And for the faithful performance of this contract the said Hancock hereby binds himself personally in solido with the company.

5. And the said Duval and Paschal jointly and severally bind

themselves to give all necessary counsel in prosecuting said claim, to write and prepare all necessary documents, to attend all committees and give all necessary time and attention to said business, and as attorneys to faithfully prosecute said claim until the final decision of the same.

In testimony whereof the parties have hereto set their hands and seals in duplicate the day and year first above written.

GEO. HANCOCK, [SEAL.]
Chief Agent and Assignee of "Texas Association."
THOS. H. DUVAL. [SEAL.]
GEO. W. PASCHAL. [SEAL.]

371 AUSTIN, Dec'r 27th, 1853.

Received on the foregoing contract the sum of two hundred and fifty dollars by Thos. H. Duval, and by Geo. W. Paschal the sum of one hundred dollars.

THOS. H. DUVAL,
GEO. W. PASCHAL,
By T. H. DUVAL.

AUSTIN, Jan'y 5th, 1854.

Received on the above contract the sum of one hundred and fifty dollars.

GEO. W. PASCHAL,
By T. H. DUVAL.

AUSTIN, Jan'y 31st, 1854.

Received of George Hancock the sum of five hundred dollars, ($250 each,) being the balance of the fee due us, respectively, under the foregoing contract. $500.

THOS. H. DUVAL.
GEO. W. PASCHAL.

372 Letter-press copy of letter from Richard T. Burchett to George Hancock, marked "B No. 3," and appended to and made part of the depositions of said Burchett:

WASHINGTON, Jan'y 19, 1854.

GEORGE HANCOCK, Esq.,
Austin, Texas.

D'R SIR: Your favor of the 21st ult. came to hand some days since. I am obliged to you for your proposition in regard to my interest in the Mercer Colony. On rec't of your favor I called at Gen'l Jessup's office, and was informed that he had ridden out, and would not return to his office that day. I left a written memorandum on the subject with the chief clerk, and on the next morning called again, but did not see the gen'l. I gave to the chief clerk

my address in this city, and desired him to request of the general that the draft should be presented to me. It has not as yet been done. When presented the draft will be honored by me. If not presented before Monday next I will again call and make inquiry after it.

My friend T. H. Duval wrote me on the subject, and his favor, received this morning, is acknowledged.

I indulge the earnest and confident hope that ultimately we must realize something from the grant.

373 If acceptable to you, I would like to have my certificates at this place, and would be obliged to you to transmit them to Gen'l Jessup, with a letter from you instructing him to deliver the same to me, if your draft in his favor for the $300 has been paid by me.

Why your draft in favor of Gen'l Jessup has not been presented, I am at a loss to divine. As soon as I succeed in finding it, will advise you.

Very respectfully, y'r ob't serv't,

R. T. BURCHETT.

Letter-press copy of letter from R. T. Burchett to Thomas H. Duval, marked "B No. 4," and appended to and made part of the depositions of said Burchett:

WASHINGTON, Jan. 19th, 1854.

DEAR TOM: Your favor of the 28th is just to hand. I received a few days since a letter from Mr. Hancock on the subject of the Mercer grant, and advising me that he had drawn in favor of Gen'l Thos. T. Jessup, of this city, on me for $300. On receipt of the

374 letter, I called at Gen'l Jessup's office, was informed by the chief clerk that he had ridden out in a carriage and would not be there during the day. I showed him Mr. Hancock's letter, and at my instance he took a memorandum which he promised to hand to Gen'l Jessup. On the next morning I called again at the War Office, and was informed by the chief clerk that he had advised Gen'l Jessup of my visit, but that the General had left the draft at home. I desired him to request the General to send the draft, giving him my address, &c. I have not as yet had it presented. I presume in a day or two that it will be presented. I fully believe with you that something will be made out of the claim, and am determined to pay my $300. Be good enough to say this much to Mr. Hancock, and request him to forward to Gen'l Jessup certificates for my three shares of stock, to be delivered by him to me in event of my having paid the $300 to the General. As soon as I can see the draft of Mr. Hancock it shall be honored. I will write Mr. Hancock by this day's mail.

Your father is here. On Tuesday he dined with me. I regret that we did not have the pleasure of Gov. Bell's company. He was

prevented from serious indisposition from joining us. I was introduced to him by your father and was much pleased with him. Nothing of much interest here. Mr. Rusk has not arrived.

Very truly,

R. T. BURCHETT.

375 Copy of letter from George Hancock to E. C. Cabell, marked "B No. 5," and appended to andmade part of the depositions R. T. Burchett:

LOUISVILLE, 30 Aug., 1869.

E. C. CABELL, Esq.

DEAR SIR: I have received several leters from you, which have remained unanswered, in relation to our "Texas Mercer's claim," hoping that when I did write I could give you a more satisfactory report than I am now able to do.

During the war, and since, nothing has been done or could be done in prosecuting the claim, and it stands, as it did when I was last at Austin, subject to the action of the Legislature.

My advanced age and infirm health may prevent my being able to go to Austin, and I have proposed to the holders of the stock to have a meeting this fall, and send some younger and more active agent to act for us.

I have ever had faith that Texas would act honorably and fairly with us, and think that our claim requires only to be urged to obtain whatever is due us.

When a meeting is ordered I will notify you.

Very truly yours,

GEO. HANCOCK.

E. C. CABELL, Esq., New York City.

376 Letter from E. C. Cabell to George Hancock, marked "B No. 6," and appended to and made part of the depositions of R. T. Burchett:

TALLAHASSEE, July 14th, 1855.

MY DEAR SIR: In common with other parties interested in "the Mercer Colony," I am anxious to know if anything has been done to secure a return for money invested in the speculation, and what, if anything, is proposed.

At your instance, two years ago, I made a payment of $600 to prosecute our claim, and others contributed ratably in proportion to their shares. Has this money been expended, and with what result? I have been called on unexpectedly to pay large sums of money, and there never was and probably never will be a time with me when it can be of more importance to realize from my resources.

You will greatly oblige me by giving all the information in your power which may interest me and our associates in these parts.

Mrs. Cabell joins me in sending kind regards to you and Mrs. Hancock.

Yours very truly,

E. C. CABELL.

Col. GEO. HANCOCK.

377 Letter from Geo. Hancock to R. T. Burchett, marked "B
378 No. 7," and appended to and made part of the depositions of R. T. Burchett:

LOUISVILLE, 22 May, 1854.

MY DEAR SIR: I herewith enclose you a certificate for three shares of stock in the Mercer Co., No. 80, 81 and 82. I have put three in one certificate, as I have no other blank certificate. It would have been sent sooner but that I have been absent from home and my papers all in a condition that I could not refer to them. Suit has been ordered against the colonists, and I have every hope that they will themselves petition the next Legislature to be relieved from it by compromising with us, as was done in the Peters claim. Mr. Duval promised me to keep you advised as to what was done.

I will visit Austin again this winter to prosecute the claim. Excuse my writing on the back of your letter, as I have just moved to a new house in the country and have no letter paper. I find, from violent neuralgia in my arm, I can scarcely write intelligibly.

I am, d. sir, very respectfully yours,

GEO. HANCOCK.

379 Memoranda identified by R. T. Burchett as being in the handwriting of Thos. H. Duvall, and marked "B No. 8," and appended to and made part of the depositions of said Burchett:

The contract with Mercer was annulled by a decree of the District Court of Navarro county in a suit brought by the State against the contractors.

There have been issued by Mr. Crockett, who was appointed commissioner for that purpose under the law of Feb'y 2nd, 1850, 1,206 certificates to colonists, for 640 and 320 acres.

The lands embraced in the limits of the colony are now and have been for some time open to location, being regarded as vacant
380 public domain.

Complainant also produced and read upon the hearing the follow-depositions of James Craik, Thomas H. Taylor, Claudius Duvall, and J. Stoddard Johnston:

Complainant's Interrogatories to James Craik, Thomas H. Taylor, Claudius Duvall, and J. Stoddard Johnston.

In the Circuit Court of the U. S. for the Fifth Circuit, District of Western Texas, at Austin.

George Hancock, complainant, *v.* J. J. Groos, Land Commissioner, &c., defendant. } Interrogatories to witnesses for complainant.

Interrogatories propounded by the complainant, William Preston, to James Craik, Thomas H. Taylor, Claudius Duvall, J. Stoddard Johnson, Edward C. Cabell and others, witnesses in his behalf herein, and to be answered by each of said witnesses upon oath :

381 1st. First Interrogatory :

State your name, age, and occupation, and how long you have pursued that occupation. State also your present place of residence and places of former residence other than your present, if any.

2nd. Second Interrogatory :

Did you know Charles Fenton Mercer, deceased, or George Hancock, deceased ? Do you know the complainant, William Preston ? If you know or have known either, state when and for how long a time. State also whether you have any knowledge of the joint stock company known as the Texas Association, organized by Charles Fenton Mercer under a colony contract between him and the Republic of Texas. If you answer yea, please state all you know in regard to said Texas Association, the purposes for which it was organized, its management, the chief agents and officers from time to time connected with it, and what, if any, concern the said Charles Fenton Mercer, George Hancock, and William Preston, or either of them, have had or now may have with the affairs of said Texas Association.

3rd. Third Interrogatory :

Examine the printed paper attached hereto and made a part of this interrogatory, the same being headed "Texas Colonization," signed "C. F. Mercer, Chief Agent of Texas Association," and dated "Sept. 20th, 1844," and upon which also appears some manuscript signed "C. F. Mercer, Tallahassee," with the date "Dec'r 10th, 1844."

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State what, if anything, you know in regard to that paper or publication. State also whether you do or do not know the handwriting of Charles Fenton Mercer, whether he is living or dead, and, if he be dead, whether the writing upon said paper and the written signature C. F. Mercer thereon are or are not in the handwriting of Charles Fenton Mercer. If you state that Charles Fenton Mercer is dead, state further when and where he died.

4th. Fourth Interrogatory;

Examine the paper now shown you and attached and made part of this interrogatory, the said paper being in four large folio pages, whereof the first page is headed with a large star and the words "The Texas Association," and purport to be certificate No. 37 or "Share No. Thirty-seven," certifying that Edmund H. Taylor is entitled to one share No. 37 of the stock of the Texas Association, and importing to be signed by Charles Fenton Mercer, original grantee, &c., &c., and bearing further the signature of G. Washington Anderson; and the second page whereof contains a map purporting
383 to be a "Map of the Mercer Colony in Texas, May 1st, 1845, scale 20 miles to the inch;" and the third page whereof contains a printed document styled "The agreement between Charles F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association," the blanks of which are filled in with writing, as of date 13th of March, 1846, to evidence a contract between said Mercer and Edmund H. Taylor at Frankfort, Kentucky, and signed "C. F. Mercer" and "Edmund H. Taylor;" and the fourth page whereof purports to contain a printed copy of "The contract of colonization of Charles F. Mercer et al. with the President of Texas, January 29, 1844."

State all you may know as to the signature of C. F. Mercer and G. Washington Anderson appearing on the first page of said paper as above described; in whose handwriting is each of said signatures, and whether G. Washington Anderson is or was known to you and is alive or dead. State also whether any part of said first page or "Share No. Thirty-seven" is in the handwriting of said G. Washington Anderson. State also what official connection, if any, G. Washington Anderson had with the Texas Association, and state any and all facts you may know in regard to said certificate and
384 the paper of which it forms a page, and the history of said paper so far as you have knowledge.

5th. Fifth Interrogatory:

Examine further the paper just inquired about and shown you, and more especially the second page thereof as in the last preceding interrogatory described, being the printed or lithographed map called "Map of the Mercer Colony in Texas, May 1st, 1845, scale 20 miles to the inch." State whether you have at any time seen said map before, and if so, when and where and under what circumstances. State also whether you have at any time seen other copies of said map, and if so, where and under what circumstances.

Have you any copy of the same in your possession? If so, please file it, marking it for identification, and make it part of your answer to this interrogatory, and state when and how you obtained it, and how long it has been in your possession.

6th. Sixth Interrogatory:

Examine further the paper described and exhibited with the
385 fourth interrogatory, and more especially the [3d] third page

of the same as afore described, purporting to be "The agreement between Charles F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association," dated in manuscript 13th March, 1846, between Charles F. Mercer and Edmund H. Taylor, of Frankfort, Ky., and purporting to be signed under the hands and seals of said C. F. Mercer and Edm'd H. Taylor at the foot of the page.

State whether you know the handwriting of C. F. Mercer; and if so, is this said signature genuine or not?

State whether you know the signature of Edmund H. Taylor; and if so, is his said signature to said paper and page genuine or not? Is said E. H. Taylor alive or dead?

State all facts you may know in regard to the authenticity of said paper and page, when and where you first saw it, in whose custody, and all material facts concerning it.

7th:

If you know, state at what time did Charles Fenton Mercer cease to act as chief agent of the Texas Association, who succeeded
386 him as such, and who succeeded his successor. Is any one now recognized as the chief agent of the Texas Association by said association under the original contract of Mercer with the President of Texas? If so, who is so recognized? Are you or not a member of the Texas Association? State all you may know as to the chief agents of said association.

8th. Eighth Interrogatory:

Do you know or do you not know whether George Hancock ever acted as chief agent and presiding officer of the Texas Association? If he did, state for how long a time, and whether he made any efforts or exerted himself to secure a hearing and allowance of the claims of the Texas Association. When did he cease to act as chief agent of the Texas Association, and who succeeded him as such? Who is recognized by the shareholders as now chief agent? If you know the efforts made in behalf of the Texas Association, state them fully.

9th. Ninth Interrogatory:

387 Do you or do you not know that the existence of the Texas Association has been recognized by the legislature of Texas since the year 1848, and that its stock has at sundry times since that date been sold and transferred as a valid and subsisting stock and sold at judicial sales as such? If yea, state what you know on the subject.

10th. Tenth Interrogatory:

Do you know or can you set forth any other matter or things which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of

and his legal representatives shall thereafter be substituted for and entitled to all the rights, privileges and immunities, and be subject to all the obligations, conditions and limitations of the original holder of said share, except the same be superadded to or in any way modified by the terms of such assignment or transfer, expressed in writing on the face of this certificate and in such cases at-
393 tested by two or more witnesses, or before a notary of some city or corporation and his certificate of the acknowledgment of said assignment or transfer subscribed thereto.

In testimony whereof the said Charles Fenton Mercer, original contractor with the Republic of Texas and chief agent of the "Texas Association," hath hereunto subscribed his name, on the thirteenth day of March, A. D. eighteen hundred and forty-six.

C. F. MERCER,
Original Grantee, &c.

Rec'd two hundred dollars, being the first and second installments payable on the above share.

C. F. MERCER,
Original Grantee and Chief Agent of the Texas Association.
By G. WASHINGTON ANDERSON,
his Attorney in Fact.

Louisville, Kentucky, March 13th, 1846.

394 The second page of said paper contains a printed "Map of the Mercer Colony in Texas, May 1st, 1845," identical in form and wording with the map hereinbefore inserted, (Rec., 190½.)

The third page of said paper is as follows:

The agreement between Charles F. Mercer, original grantee of the Republic of Texas, and the stockholders of the Texas Association.

This agreement, made this thirteenth day of March, A. D. eighteen hundred and forty-six, between Charles Fenton Mercer, of the State of Florida, of the first part, and Edmund H. Taylor, of Frankfort, Kentucky, of the second part.

Whereas the party of the first part has by an agreement with the Republic of Texas, acting by Sam Houston, President thereof, dated 29th January, 1844, obtained a grant of lands of great extent, estimated at 8,000 square miles, lying on the Rivers Trinity and Brazos, in the counties of Fannin, Nacogdoches, and Robertson of said Republic, and binding upon and embracing besides the quantity above mentioned about 2,200 square miles of certain tracts
395 of land granted by said President Houston on the 25th day of July, 1842, to W. S. Peters and others, to which lands they have prior right should they choose to avail themselves thereof, upon condition, nevertheless, that the party of the first part to this agreement and such associates as he may choose shall within certain

limited periods introduce and settle on said lands a certain number of emigrant families on the terms in said agreement of the 29th of January, 1844, particularly set forth; for all which particulars and all other matters pertaining thereto reference may be had to the said agreement on file in the office of the Department of State of the said Republic, and to the printed copy thereof hereto annexed; and the party of the first part to this agreement is desirous to choose the party of the second part to be one of his associates according to the terms for the said agreement, and to the extent of the interest in the same which is herein set forth and agreed upon, such interest being designed to be a hundredth's part of the whole interest of the said party of the first part in the said agreement between him and the said Republic dated 29th January, 1844: Now, this agree-
396 ment witnesseth, That the party of the first part thereto, for and in consideration of the sum of one dollar to him in hand paid at the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the further sum of five hundred dollars lawful money of the United States to be paid in manner hereinafter provided, and of the several covenants hereinafter expressed, hath conveyed, assigned, and set over to the part of the second part one-hundredth part of all his right, title, interest and immunities given, granted, conveyed and made over to him the party of the first part to this agreement by the said agreement between himself and the Republic of Texas of the 29th January, 1844; and the said party of the first part hath chosen and hereby chooses the said party of the second part to be one of his associates for the execution of the said agreement between him and the Republic of Texas; subject, nevertheless, to all the conditions and limitations hereinafter expressed, and according to the true intent and meaning of said agreement between the party of the first part and said Republic, and of this agreement also.

The party of the first part, for himself and the associates he
397 hath chosen or may hereafter choose, and for his and their legal representatives, covenants and agrees with the part of the second part and his legal representatives as follows, viz: to apply the sum of money named as the consideration of this agreement to the objects of the agreement aforesaid of the 29th January, 1844, between himself and the Republic of Texas, according to the best of his judgment and ability; replacing thereby such sums as he has expended, and providing for such expenses as he may hereafter incur in the execution of said agreement between him and the said Republic, charging to the association to be formed by this and similar agreements nothing by way of compensation for his services, or for salary as chief agent of such association, but only his personal, traveling, and other expenses, incurred or to be incurred by him as chief agent, for conducting the said agreement and the scheme of colonization proposed by it to a successful issue; and the said party, moreover, binds himself to provide, as soon as practicable, one or more suitable and trustworthy persons, to act in the order in which

they shall be named, as chief agents of the association to be formed as aforesaid, in the event of the death, sickness, inability from any cause, or disinclination further to act, of him, the said party of the first part to this agreement. Such successors shall have every
398 power and authority vested or recognized by this agreement in the first part thereto; and in case of the necessity of resorting to such other agent or successor, as his interest will be much less than that proposed to be retained in the former agreement by the chief agent hereby created, any successor of said agent shall be entitled to receive a reasonable compensation for his services, over and above his actual expenses, while engaged in the service of the association; provided that such extra compensation shall not exceed ($2,000) two thousand dollars per annum, and shall be charged upon and paid out of the common funds of the association. The name of the persons appointed, as aforesaid, to succeed the party of the first part as chief agent, in case of his death, disability, or declining to act, shall be transmitted to the Department of State of the Republic of Texas, to be there filed or recorded for the information of all persons interested therein; and shall be in writing subscribed by the party of the first part to this agreement; and from the time that some one of the persons so named, and entitled by priority to act, shall enter upon the duties of chief agent, he shall have all and every power vested by this agreement in the said party
399 of the first part thereto; but nothing herein contained shall divest the party of the first part of any share of his interest in the said agreement between himself and the Republic of Texas, except the share hereby conveyed to the party of the second part to this agreement.

The party of the first part, so long as he continues to act as chief agent of the association hereby created, and each of his successors so long as he shall act as such, shall have every power necessary or expedient for carrying into effect the agreement of the 29th of January, 1844, and this agreement. He shall have especially the following powers, though by their enumeration it is not designed to exclude others which circumstances may render necessary or proper, viz: the name of the association shall be (a common name being authorized by the said agreement of the 29th of January last) "The Texas Association," and the chief agent shall subscribe his name accordingly to all acts of his in behalf of the association, and by such subscription shall bind the parties of the second part as well as himself and all other associates under the agreement of the 29th January aforesaid. His successor as chief agent shall have power
400 in like manner and to like extent to bind the said first party and all persons claiming by, through, or under him, provided that no associate, nor the party to the first part of this agreement, shall be bound to an extent beyond the interest they respectively hold in, or under, the said agreement of the 29th of January, 1844, and the sum which said associates bind themselves to pay by this and like agreements towards the funds of the association. The chief

agent shall have also the following powers, viz: to borrow money on the credit of the common funds in lands or debts due to the "Texas Association," or to become due, whenever in the opinion of the chief agent it shall be deemed expedient for the interests of the association. He shall have power to sell or hypothecate any of the lands of the association for the purpose of paying any debts thereof, or purchasing for the common benefit and colonizing the sections of land reserved to and by the Republic of Texas out of the grant aforesaid, to the party of the first part and such associates as he may choose. He shall have power to grant to any emigrant family for reasons seeming to him good, more than the minimun quantity of a quarter section of land on such conditions as he may please to annex thereto, and to sell to such family or to any other the residue of the section or any part thereof. He may make contracts for the improvement of any of the lands of the association whenever he may deem such contracts expedient and pay for such improvements out the lands or monies of the association. He shall have power to lay in by purchase and to sell to such emigrants as may come unprovided, necessary food, valuable trees, shrubs or seeds, and farming and garden tools, and in cases of necessity to lend to the emigrants small sums of money out of the funds of the association, to be thereafter repaid to the association. He shall contract for the survey and distribution into sections and fractional parts thereof, of such lands as may be required from time to time for the immediate settlement of the emi-
401 grants, and may purchase with the lands or money of the association, for the mutual benefit of the association and the vendor, any liabilities of the Republic of Texas, and invest them in the purchase and colonization of the reserved sections or any part of them, according to such terms as he may deem advantageous to the association. He may contract for the passage of emigrant families from the United States of America or their territories, or from any country in Europe to the lands to be colonized, on such terms as he may deem expedient for the association, and charge upon the lands to be granted to the several emigrant families, either by mortgage or deeds of trust, or other security, all advances made for their transportation, or their other necessary expenses or outfit.

He shall have power to sue for and recover any lands occupied or claimed under any prior grant or location, within the boundaries of the tract aforesaid set apart for colonization, which he shall deem to be illegally granted or located, or to compromise all and any claims founded on such occupation or prior grant or location, on such terms and conditions as he may consider expedient. And forasmuch as the various duties of the chief agent will be of neces-
402 sity spread over so large a surface as to render it beyond the power of one man to perform them all in due time, he shall have power to appoint, whenever he may deem it expedient, and to fix and pay the compensation of any number of sub-agents, and to prescribe their respective duties; provided that all expenses incurred by the chief agents or sub-agents shall be chargeable on the funds

provided by this and similar contracts or agreements between the party of the first part and his associates, and upon the lands of the association, and the money, notes and bonds derived from the sale or hypothecation thereof; but neither the party of the first part nor any of his associates shall be bound by any act of his sub-agents, or by any contract of his as chief agent, beyond his or their express agreement in writing, and their interest in the common property acquired or held for their benefit; and to this extent each and every associate of the party of the first part, as well as the said party himself, shall be bound for all excess of expenditure beyond the funds derived from the sale of the forty-hundredths, being forty shares of the
403 entire interest to be acquired by the agreement of the party of the first part with the Republic of Texas, and in the exact and just proportion of the number of their respective shares; the party of the first part having granted five shares of stock to Dr. Daniel Rowlett, of Texas, late of Virginia, without any pecuniary consideration, for services to be rendered to the association in Texas, and having determined for the present to reserve fifty-five shares of his whole interest to himself and his legal representatives, and to sell only forty shares of his entire interest in order with the funds to be derived therefrom to carry on with promptitude and success the plan of colonization devised by his agreement of the 29th of January, 1844, with the Republic of Texas. And the party of the first part expressly reserves to himself the right to retain or dispose of as he pleases, for his own use, the fifty-five shares of his reserved interest in the said agreement of the 29th January, 1844, between himself and the Republic of Texas: provided, however, that no disposition thereof which he may make shall withdraw any part of his reserved interest aforesaid from a proportional charge, for all expenses of the association, exceeding in the aggregate the sum derived from
404 the sale of the forty shares set apart as aforesaid, and from such other resources as the fees paid by the colonists for their surveys and plats, and the sale or other application of the lands of the association may supply.

And inasmuch as it is desirable that the various shareholders of the "Texas Association" shall become actual settlers and cultivators of the soil of Texas, which they may acquire by means of their association under this agreement and other similar agreements founded on the agreement aforesaid of the 29th of January, 1844, between the party of the first part to this agreement and the said Republic, it is further understood and agreed by the parties to this agreement, and they mutually covenant to that end, that the party of the first part shall retain and appropriate to his own use, at any time within the five years allowed by the Republic of Texas for the colonization of the lands described in the agreement of the 29th of January, 1844, between the said Republic and the said party of the first part, any section or parts of sections acquired by the association under and by virtue of
405 said agreement of the 29th January, 1844; provided that the whole extent of any lands so retained or appropriated to his

own use by the party of the first part shall not exceed six per cent. of the whole quantity of land at any time so acquired, such quantity to be estimated and charged to the party of the first part in the final distribution among the "Texas Association" of all the lands acquired by them as so many acres of unimproved lands of average value with the lands in general of the association, however much they may have been improved, or may have appreciated in value from their vicinity to other improved lands; and the power hereby recognized and conceded to the party of the first part to set apart and appropriate to his own exclusive use six per cent. of all lands acquired by the association shall in like manner extend to the sections reserved by the Republic in the agreement aforesaid of the 29th of January, 1844, with this condition: that on the exclusive appropriation of six per cent. of the reserved sections acquired by the association, if the same shall have been purchased by the funds thereof, whether consisting of lands or money, the party of the first part, or his legal representative, shall repay any sums the
406 association may have expended therefor, or replace an equivalent thereto in other lands; but if the reserved sections shall have been paid for by the emigrant families in the purchase of their lands, the association shall be deemed to have no claim for reimbursement of any purchase money. In like manner any holder of a share of one-hundredth part or more of the entire interest of the association may, in virtue of his being a member thereof, set apart for his own exclusive use one per cent. of the common lands acquired by the association, provided he shall remove to Texas or occupy and improve the same by his agent. And it shall be a sufficient evidence to set apart any such land for separate and exclusive use to describe it by its proper bounds and declare such intent by a written instrument, under the hand and seal of the shareholder, and recorded in the county in which the land lies that is so set apart.

And it is further covenanted and agreed by the parties to this agreement that at the end of the term granted by the Republic of Texas for the colonization of the lands set apart therefor by the agreement aforesaid of the 29th of January, 1844, there shall be a just partition of all lands or other property acquired by the
407 "Texas Association." In this partition the distribution shall be by lottery, where equal interests are to be allotted, under the agency of three commissioners, to be appointed by the President of Texas, for the time being, at the request of any three associates, or of any person having three shares of the one hundred into which the whole stock of the association is considered as divided. Should the President decline acting on such request, the partition shall be made, whatever be the authority conducting or charged with it, by distributing the whole lands of the association into one hundred parcels of as equal quantity and value as practicable and allowing any shareholder of one or more shares to draw one parcel for every share he holds. Every shareholder who shall already have appropriated to his exclusive use the whole or part of the land to which he is en-

titled, shall account for the same by surrendering all or an equal quantity out of the parcel he shall have drawn, and all the lands so surrendered shall be again classed, and drawn out by those associates or shareholders who may be entitled thereto, according to their respective proportions. All sums of money shall be divided into
408 equal portions, one hundred in number, and paid over according to the respective interests of the shareholders. Any sums due to the association shall be collected by the chief agent at the date of the said partition and paid over, in like manner, as speedily as practicable, to the persons entitled thereto. And the said party of the first part, for himself and his legal representatives, and his successor as chief agent, or such of them as shall enter upon that trust, covenants with the party of the second part and his legal representatives to render once at least in every six months to the Department of State of the Republic of Texas, or at any time at the request in writing of any shareholder or holders of five shares of the common stock of the "Texas Association," a full and true account of all monies expended by him, or as far as he knows the same under his authority, and for the "Texas Association," under general heads of expenditure, distinguishing therein his personal expenses from all other heads, and stating all sums received by him or his sub-agents, on account of his or their agency, and detailing by their general titles and objects all contracts made by him or them, with the names of the contractors, their places of abode where known, and the
409 dates of their respective contracts; also the number of emigrant families actually settled on the lands aforesaid, and whatever else may tend to show the actual condition of the affairs of the "Texas Association" and their future prospects.

Finally, the second party to this agreement, for himself, his heirs, executors, administrators and assigns, covenant with the party of the first part thereto, to pay to the said first party, as agent of the association, or to such person as he may appoint to receive the same, or to his successor in the chief agency of the association, or to such person as he may depute to receive the same, one-fifth part, namely: one hundred dollars of the five hundred dollars expressed in this agreement as the consideration for this agreement, and the like sum on the 1st day of October of each of the years 1845, 1846, 1847, 1848, until the entire sum of five hundred dollars be paid as before stipulated; provided that if at any time for the space of thirty days after the day of payment, or the same shall become due, any one of said installments be not paid, at such place as shall be pre-
410 viously named by said agent or his successor, all the right, title, and interest of the party of the second part, and of any and every assignee or other legal representative thereof, and of all persons claiming by, through, or under him, them or any of them, shall become utterly void; and this agreement and every clause thereof shall cease and determine, as if the same had never been made, and all right, title, or interest in and to the share of the stock of the "Texas Association" hereby conveyed, shall revert to the party of

the first part, or to his legal representatives, to be held or otherwise disposed of for the benefit of the "Texas Association" hereby formed; provided that if the party of the first part shall himself pay the sum or sums due, and thereafter as they become due, for the said share for the use and benefit of the association, he may hold the same on his own private account, in like manner as he holds the fifty-five shares herein reserved for his exclusive benefit.

In testimony whereof, the parties aforesaid have hereunto set their hands and seals on the day and year in this agreement first mentioned.

Test: C. F. MERCER. [SEAL.]
EDM. H. TAYLOR. [SEAL.]

411 The fourth page of said paper contains the "contract of colonization of Charles F. Mercer et al. with the President of Texas, January 29, 1844," which is identical in words and figures with said contract, as hereinbefore inserted. (Rec. .)

Cross-Interrogatories to James Craik, Thomas H. Taylor, Claudius Duvall, and J. Stoddard Johnson.

Cross-interrogatories propounded by defendant to complainant's witnesses, James Craik, Thomas H. Taylor, Claudius Duvall, and J. Stoddard Johnson:

Cross-Interrogatory First:

Are you a member of the "Texas Association"? Have you ever been a member of said association; and if so, when? What number of shares do you own in said association, and how did you come to be the owner thereof? What number of shares have you ever owned in said association, and how did you come to be the
412 owner thereof, and what disposition, if any, did you make of said shares? Who were the original or first shareholders in said association? Who are now the shareholders in said association? Name them and state the residence of each. From what source do you derive your information as to the management of said association, and as to any connection that Charles Fenton Mercer, George Hancock, or Wm. Preston had with the said association? How did you obtain such information, from whom did you obtain it, and when did you obtain it?

Cross-Interrogatory Second:

When and where did Charles Fenton Mercer die? When and where did George Hancock die?

Cross-Interrogatory Third:

Did you ever meet Charles Fenton Mercer in Texas; if so, at what date and in what portion of Texas did you meet him, and how long did he remain in Texas? When and where was the last time you

saw Charles Fenton Mercer, and in what was he engaged, if anything?

413 Cross-Interrogatory Fourth:

Were you present at any time when the Texas Association was organized; if so, when and where was it organized, and how was it organized? State fully all about its organization, and the part, if any, that you took in it, and name those who were present and took part in the organization.

Cross-Interrogatory Fifth:

Were you ever present at any of the meetings of said "Texas Association"? If so, state when and where the same occurred, name those persons who were present, and state the purposes of such meetings and the business transacted at such meetings. When and where was the last meeting of said association held, and who were present at the same, and who were the officers of said association when you last knew it as an association?

Cross-Interrogatory Sixth:

Was Charles Fenton Mercer a shareholder in said "Texas Association" at the time of his death; if so, how many shares did he then own in said association? Was he not the chief agent and
414 the largest shareholder in said association at the time of his death? Was there any meeting of said association, or of the shareholders thereof, after the death of said Mercer; if so, where was said meeting held and when was it held, and who were present and what business was transacted thereat?

Cross-Interrogatory Seventh:

Was there any chief agent of said association selected or appointed after the death of Mercer? If so, who was the person; who selected or appointed him; when and where did this occur; who were present; how was such selection or appointment made; how was the same evidenced; who were the officers of the association at that time; was there then a secretary of the association; is he living or dead; what was his name; did he keep minutes of the proceedings of said association?

Cross-Interrogatory Eighth:

If you say in answer to direct interrogatory 7th that any person has been recognized as chief agent of said association since the death of Mercer, or that any person is now recognized as such chief
415 agent, name the persons so recognizing them, the time and place of such recognition, and in what does this recognition consist, and how do you know about these matters. That is, state the sources of your information.

Cross-Interrogatory Ninth:

If you state in answer to direct interrogatory 8th that George Hancock ever acted as chief agent and presiding officer of said as-

sociation, state when and where he so acted; how do you know that fact; by what right or authority did he so act; how was he selected or appointed so to act, and by whom, and when, and where was this selection or appointment made, and in what manner was the same made known and evidenced?

Cross-Interrogatory Tenth:

If in answer to direct interrogatory 9th you say that the "Texas Association" has been recognized by the Legislature of Texas since the year 1848, please cite the act, resolution, or other proceeding of such Legislature which, in your opinion, contains such recog-
416 nition. If you say in answer to said direct interrogatory that stock has at sundry times since 1848 been sold and transferred, &c., state when and where such sales and transfers took place; who were the parties to the same, and at what price did such stock sell?

Cross-Interrogatory Eleventh:

Who are the present shareholders in said Texas Association? Name each of them and state the residence of each of them, and state your means of knowing that they are shareholders.

Cross-Interrogatory Twelfth:

Do you not know that in 1848 the Mercer Colony contract was decreed to be forfeited and null and void by the District Court of Navarro county, Texas, and that since that date the State of Texas has not regarded said contract as valid and binding, but, on the contrary, has held and treated the same as no longer existing?

Cross-Interrogatory Thirteenth:

Did not Charles Fenton Mercer and the shareholders in said association know in 1848 and 1849 and 1850 that the State of
417 Texas, through her officers and people, had repudiated said contract and refused to recognize the same as a valid and subsisting contract, and denied that said Mercer or said shareholders had any rights under said contract? Was not this a notorious fact generally throughout the country?

WILLSON & GAINES,
AND PEELER & MAXEY,
Sol's for Defendant.

Answers of James Craik to the foregoing direct and cross-interrogatories.

Also the deposition of James Craik, taken at the same place, on the 29th day of May, 1880, to be read as evidence in the same suit as stated in the caption to the deposition of J. Stoddard Johnson on the part of the complainant Hancock, devisee, or Preston, trustee, under the same agreement and in answer to the same inter-
418 rogatories and cross-interrogatories, this deposition being taken in all respects as that of said Johnson, the witness being first

duly and lawfully sworn by me, neither party, agent, or attorney being present. The witness answers the interrogatories and cross-interrogatories as follows:

1 Int'y. Answer:

Name, James Craik; age, 73 years and over. Residence, near Louisville, in Jefferson county, Ky. Have been a resident of Jefferson county, or city of Louisville, since August, 1844. Occupation, rector of Christ's Church, in Louisville, and have been thus occupied since I came here.

2 Int'y. Answer:

Yes, very well; all three of them. I knew Gen. Mercer when I was a young man. I knew Col. Hancock also for many years, and was intimate with him, and I have known Wm. Preston since he was a young man. I also knew George Washington Anderson very well, and he induced me to take or purchase a half of one of the original shares of stock in said Texas Association, and I
419 frequently met Gen. Mercer at Mr. Anderson's office. In this way I had some knowledge of said association, which was organized by General Mercer. At the time I purchased this stock General Mercer was at the head of it and was its chief manager, and Mr. Anderson was the secretary thereof. I presume I paid the first and second calls. I have no receipts for them, but I have a receipt for the third call, which is herewith filed as a part of this deposition, marked J. C. No. 1, and is asked to be read as a part hereof.

I also have a letter from G. Washington Anderson, dated Feb'y, 1848, concerning this stock and the final payment therefor. This letter is also filed herewith as a part of this deposition, marked J. C. No. 2. I paid the fourth and last call, alluded to in that letter, upon said stock, and immediately, or soon thereafter, I received from General Mercer, through Mr. Anderson, a certificate for one full share of stock, No. 35, in said association. The other half of the share was given or presented to me. This original certificate has been kept by me ever since, and I now, by request, attach it hereto,
420 mark it J. C. No. 3, and ask it to be taken and read as a part of this deposition. It was never surrendered by me, and has never been out of my possession. It has upon it a map of the grant, an agreement between C. F. Mercer and myself, signed by said Mercer under seal, and on the fourth page a printed copy, or what purports to be the original contract between Mercer and the President of the Republic of Texas.

3 Int'y. Answer:

I know nothing about the particular paper mentioned and described in this int'y. I do not know Charles Fenton Mercer's handwriting. It appears to be identical with the one I have filed, marked J. C. No. 3, except the filling of the blanks, numbers, and date. I presume C. F. Mercer is dead. I have not heard of him for many years; cannot speak as to his handwriting.

4 Int'y. Answer:

I have again examined the paper described. I cannot speak of the handwriting or signature. It is identical with the paper
421 I have filed, except the filling in of blanks, names, and dates. The paper I have filed I know to be genuine, and this I know from conversation with parties subsequent to its date; but I cannot say further about the paper attached to the question. I cannot answer as to Mr. Anderson's writing further than to say that the papers I have filed are genuine.

5 Int'y. Answer:

I have before answered this question, and have filed the copy of the map with this deposition.

6 Int'y. Answer:

I know nothing further in relation to this paper than I have stated.

7 Int'y. Answer:

I cannot state the time he—Mercer—ceased to act as agent of the association. I understood that Col. Hancock succeeded General Mercer, and that General Wm. Preston succeeded Col. Hancock; but I have no specific information on the subject.

8 Int'y. Answer:

422 From conversation with Mr. Hancock and my intercourse with him I believe he did act as the chief agent of the association for a number of years. I believe and understood he went to Texas several times in the interest of the association. I think he continued to act until the time of his death, and General Preston has acted in the same capacity since.

9 Int'y. Answer:

I have no personal knowledge of these subjects.

10 Int'y. Answer:

I do not know.

Cross Int'ys by plaintiff's counsel, the pl'ff responds as follows:

1 Cross-Int'y. Answer:

I am a shareholder; have nine shares of the divided stock. I have already stated how I became the owner of it. I still own it. I can't say who were the original shareholders. I was one of them. I know nothing further in relation to this question, except I
423 saw publication of the appointment of Preston by Hancock, either by deed or will, and I know Preston has been acting. I have met him at meetings held by the stockholders.

2 Cross-Int'y. Answer:

Don't know when and where Mercer died. Hancock died at his place in Jeff. county, Ky., a few years ago. I can't now give the date.

3 Cross-Int'y. Answer:

I never did. I never was in Texas.

4 Cross-Int'y. Answer:

I was not, and don't know anything personally about it, except from authenticated documents.

5 Cross-Int'y. Answer:

I think I have attended three meetings of the stockholders of the association, at the office of the association in Louisville. General Preston presided at all of said meetings, and Mr. Durrett acted as secretary at one or more of them. They were recent meetings. I cannot give the particulars in relation to them.

424 6 Cross-Int'y. Answer:

I know nothing of Gen'l Mercer being a shareholder at his death. I know nothing on the subject, except there have been meetings of the shareholders since his death. I cannot say how many. I know I attended three of them.

7 Cross-Int'y. Answer:

I have said that Col. Hancock succeeded General Mercer. I know nothing of his appointment. I know he acted, and I know Preston is now acting, but further I cannot state.

8 Cross-Int'y. Answer:

I recognized Hancock as the chief agent of the association up to his death, and I believe he was generally recognized as such by the parties interested. Preston has been since, and is now, recognized in the same way.

9 Cross-Int'y. Answer:

I have stated all I know on the subject.

10 Cross-Int'y. Answer:

I know nothing about it.

425 11 Cross-Int'y. Answer:

I cannot answer this question.

12 Cross-Int'y. Answer:

I know nothing about.

13 Cross-Int'y. Answer:

I know nothing about it.

JAMES CRAIK.

Sworn to and subscribed before me by James Craik this 29 May, 1880.

THO. P. SMITH,
Not. Pub., Jeff. County, Ky.

Exhibit to depositions of James Craik, endorsed, to wit: "J. C. No. 1; part of James Craik's depo., taken by me on the 29 May, 1880. Tho. P. Smith, N. P., J. C.":

Rec'd of the Rev. Mr. Craik fifty dollars, the third installment on half share of stock in the Texas Association Land Company.
Louisville, 5th Feb'y, 1847.

C. F. MERCER, *Chief Agent.*
By G. WASHINGTON ANDERSON.

426 Exhibit to depositions of James Craik, endorsed, to wit: "J. C. No. 2; part of James Craik's deposition, taken by me 29 May, 1880. Tho. P. Smith, N. P., J. C.":

REV. AND DEAR SIR: If it is entirely convenient you will oblige me by letting me have the fifty dollars due in October last on your Texas land stock. I would not call for it, but the General left me a note of his to pay to the Bank of Ky., relying upon your installment with the installments from one or two more to discharge it. The General told me when last here that he should make no further calls upon the stockholders of the association, and further, that he would not require anything more from you, and was willing to make a title at any time to one full share.

Yours very truly,
G. WASHINGTON ANDERSON.

Friday morning, Feb'y —, 1848.

427 The certificate of stock referred to by witness, and made part of his answers, endorsed "J. C. No. 3, part of James Craik's depositions taken by me 29 May 1880, Tho. P. Smith, J. P., J. C.," is in four large folio pages, the first page whereof contains a certificate of stock which is identical with the blank certificate before read in evidence and which has been heretofore copied in this record on page , except that the blanks therein are filled up with the share No. "Thirty-five," the name of the owner of the share, "Rev. James Craik," and said certificate is dated "15th day of August, A. D. eighteen hundred and forty-five," and signed "C. F. Mercer, original grantee, &c." The second page of said certificate contains a printed "Map of the Mercer Colony in Texas," which is identical in all respects with the map heretofore copied in this record on page ; and the third page thereof contains the agreement between C. F. Mercer and the stockholders of the Texas Association, which is identical with the agreement before read in evidence and heretofore copied

in this record on page , except that the blanks therein are filled up with the date "15th day of August, A. D. 1845," and the agreement is made between "Charles Fenton Mercer of the State
428 of Florida" and "Rev'd James Craik," the consideration stated being "Five hundred dollars lawful money of the United States," the receipt of "one-fifth part, viz.: of the consideration expressed in this agreement at the date thereof," being acknowledged, and said agreement being signed "C. F. Mercer, [seal]."

The fourth page of said certificate contains a copy of the agreement of colonization of Charles F. Mercer with the President of Texas, which is identical in all respects with the contract before read in evidence and heretofore copied in this record on page .

429 *Answers of J. Stoddard Johnson.*

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas.

George Hancock's devisee	]	
No. 98. *against*		In Equity.
W. C. Walsh, Commissioner of the General Land Office of Texas.	]	

The deposition of J. Stoddard Johnson, taken by Thomas P. Smith, a duly commissioned, sworn, and acting Notary Public of Jefferson county, and in the State of Kentucky, at the office of said notary in the Law Building, corner of Centre and Green streets, in the city of Louisville, on the 24th day of May, A. D. 1880, to be read as evidence on the part of the complainant in the above entitled suit in equity pending in the Circuit Court of the United States for the fifth circuit and western district of Texas, at Austin, under and in pursuance of and agreeably to the agreement hereto attached and made a part hereof, and in answer to the interrogatories and cross-interrogatories herewith returned; the witness being first duly
430 sworn by me according to law, neither party, agent or att'y being present.

After the witness was sworn, the further taking of the deposition was adjourned, to meet to-morrow morning at 10 o'clock, at said office.

THO. P. SMITH,
Not. Pub., Jeff. Co., Ky.

Tuesday, May 25th, 1880; met pursuant to adjournment, and continued the taking of the deposition of J. Stoddard Johnson, as follows:

To interrogatories-in-chief the witness answers as follows:

First Answer:

My name in full is Josiah Stoddard Johnson, forty-seven years of age, a native of New Orleans, La., at present residing in Frankfort, Kentucky. Am an editor by profession, and have been editor of the Frankfort Journal since 1867, and am one of its proprietors. On the death of my parents, in 1837–'8, I was brought to Kentucky, and with my two brothers was raised in the family of George Hancock, whose wife was my mother's sister; they having no children.

I was not adopted by them, but was reared by them, and their
431 house was my home till I married at my majority. I received my collegiate education at Yale College, where I graduated in 1853, having given it preference from the fact that Col. Hancock received his education there. After graduating at the Louisville Law School in 1854, I married. From 1855 to 1859 I planted cotton in Phillips county, Arkansas, when I returned to Ky., and in the latter year became a farmer in Scott county, which was my occupation when the war broke out. Went south and entered the Confederate army in 1862, and served until the surrender upon the staff of Gen. Bragg and Gen. Buckner, but for the greater portion of time as chief of staff to Gen. John C. Breckenridge. After the war until 1867, when I became a resident of Frankfort, Ky., I practised law in Helena, Arkansas. Was adjutant general of Kentucky, 1870–'71, and secretary of state from 1875 to 1879.

Second Answer:

Knew Charles Fenton Mercer. First remember him in 1846–'7, when he came to Kentucky to live on his property in Carroll county, near the mouth of the Kentucky River. I was living at the time

with George Hancock, who owned a farm adjoining Mercer's
432 tract. Mercer had no improvements on his place suitable for his residence, and for some time—perhaps a year, while building one—was an inmate of Col. Hancock's family. Hancock lived at this place until 1849, when he removed to Hampden, an estate five miles from Louisville. For several years after this Mercer was a frequent visitor in Col. Hancock's family and upon terms of intimate correspondence. He was a man of great information, and his conversation and letters always interested me. My acquaintance with George Hancock is stated in preceding answer. Have known William Preston from my earliest recollection—since 1838.

My knowledge of the Texas Association is only general—derived from hearing it spoken of by George Hancock from the time of his first connection with it until his death, and from access to the papers before and after that event. Have had no interest as stockholder or legatee which would induce more special study or understanding of the history, objects, &c., of the association.

Third Answer:

I know nothing of the paper referred to, but identify the
433 writing (except the figures upon the left) as the handwriting

of C. F. Mercer and the signature as his. As stated above, I was familiar with his handwriting during his life, and have lately, since the death of Col. Hancock, read over several hundred of Mercer's letters to him. There is a uniformity of style and a certain idiosyncracy which make it marked. Charles Fenton Mercer died in ..... on or about the ..... day of ....., 1858.

Fourth Answer:

I have no specific knowledge of the paper cited, except that I have frequently seen it. Knew G. Washington Anderson, who is dead, and recognize his signature. Recognize signature on first page of "C. F. Mercer, original grantee, &c., &c.," which is in his handwriting. The words Thirty-seven, after "Share No.," and the writing "Thirty-seven (37)," in the body of the instrument, are in Mercer's handwriting. The other writing, except as stated, is in the handwriting of G. Washington Anderson. The filling up in the contract on third page is in the handwriting, in part each, of Anderson and Mercer. The signature of C. F. Mercer is in his own handwriting.

434 Fifth Answer:

Can give no specific answer *answer* to this interrogatory further than that I have no such map, but can say that I have seen the map in question before and other similar maps in George Hancock's possession.

Sixth Answer:

As said in ans. 4, I recognize Mercer's signature at bottom of page 3 of instrument in question, as also his handwriting and that of G. Washington Anderson in the filling up. Knew Edmund H. Taylor, who was cashier of the Branch Farmers' Bank, and who has been dead some years. Kept my account in his bank and recognize his signature beneath that of Mercer.

Seventh Answer:

Charles Fenton Mercer ceased to be chief agent of the Texas Association prior to 1853, and was succeeded by George Hancock, who was in turn succeeded by William Preston. Hancock first became actively interested in the association in 1852, and in the winter of 1852–3 went to Texas to look into the claim for the first time. I remember the fact and have read since his death the diary kept
435 by him of his trip. I identify the time when Mercer ceased to have an interest, approximately, by a letter from Mercer to Hancock, written from Washington, D. C., March 1, 1853, in which he, Mercer, urges Hancock to remit him the sum due for his, Mercer's, interest in the Texas grant made him by President Houston. George Hancock was chief agent of the association continuously until his death, when he was succeeded by William Preston, who was constituted his successor by said Hancock in his will executed August 13th, 1875, attested by William Preston, Susan Pres-

ton, and Denis Long, and probated in the Jefferson, Ky., County Court, Oct. 21, 1875. George Hancock died August 27th, 1875, at his residence in Jefferson county, Ky., thirteen miles from Louisville. Upon his death his effects were taken in charge by myself and brother, Harris H. Johnson, since deceased, at the request of Mrs. George Hancock. On the 20th day of October, the will of said Hancock having been read by us, we in accordance therewith placed into the hands of William Preston, as chief agent of the Texas Association and successor of George Hancock, all the books, papers, maps, &c., pertaining thereto, and among them a record book now in the safe of said association at its office in Louisville, marked
436 on the back "Record book of proceedings of meetings of the association." Upon such delivery I drew up and entered upon pages 38–9 a statement setting forth the fact and the authority by which such delivery was made, and the same was signed by my brother and myself. I have examined said record book to-day for the first time since delivery, and identify said entry on pages 38–9 as in my handwriting and signed as stated.

Eighth Answer:

The preceding answers most of the questions embraced in the 8th interrogatory. Know that he made constant efforts to secure the recognition of the claim and went frequently to Austin. William Preston has been recognized as chief agent since Hancock's death, and is and has been prosecuting the claim vigorously. Am not a member of the association.

Ninth Answer:

Have no specific information.

Tenth Answer:

The foregoing contains all the information I can give from memory, the statement, being made without knowledge that my deposition would be taken until too late to enable me to refresh my
437 memory by special reference to papers and letters in my possession whereby I might have given much more specific testimony.

Answers to Cross-Interrogatories.

First Answer:

Am not, nor have ever been, a member of the association, or had any interest therein. My knowledge of the connection of Mercer, Hancock, and Preston with the association is stated in answers to direct interrogatories, particularly No. 2. The information, when not from sources cited, was from my own knowledge.

Second Answer:

Mercer died in 1858—the precise date and place I cannot give, not having access to papers in my possession to refresh my memory.

George Hancock died at his residence, near Louisville, Ky., August 27th, 1875.

Third Answer:

Never met Mercer in Texas. Last saw him in 1850, when he was engaged in farming in Carroll county, Ky., it being his custom to visit in Col. Hancock's family as stated in my 2d answer direct.

438 Fourth Answer:

No.

Fifth Answer:

Was never present at a meeting of the association, and only know of its meetings from the published proceedings, or calls for said meetings in the newspapers, and from the minutes of the association, which I have frequently inspected when in my possession and since. The last officers of the association are those now holding, whom, I am informed, are William Preston, chief agent, and M. Lewis Clark, Jr., secretary.

Sixth Answer:

Mercer was not a shareholder of the association at the time of his death, he having, as stated upon my best belief, disposed of his interest prior to March 2d, 1853. I have no specific information as to the order or time of the meetings of the association after his death, or the transfer of his interest.

Seventh Answer:

For answer to this, see my answer to direct interrogatory No. 7.

439 Eighth Answer:

The recognition of George Hancock and William Preston as chief agents, successively, after Mercer, is evidenced by the minutes of the association heretofore cited, duly signed by said persons in their official character, and by that public notoriety and general recognition which gives publication of such facts to a community.

Ninth Answer:

George Hancock acted as chief agent of the association from a time not long subsequent to 1853 until his death. I have not referred to the minutes to see the date of his first official act, but I fix the time from the periods when he first became actively interested in the business of the association and the prosecution of the claim as stated in my answer to 7th direct interrogatory. From the period of his first trip to Texas on this business, in the winter of 1852–3, till his death, it seemed the absorbing topic of his conversation, if not the object of his life. He spent large sums of money in the prosecution of the claim,—in going to Texas at various

times,—in bringing it to the attention of the Texas Legis-
440 lature by memorial and other publication. In all my intercourse with him, for more than twenty years prior to his death, he was actively engaged in the prosecution of the claim, talked constantly of it and so hopefully that it became known a by-word among his friends as his hobby. He had faith in the justice of the claim and the ultimate justice of Texas, and died, as he had lived, believing that his interests in it would enrich his heirs and devisees.

Tenth Answer:

I have no knowledge on this point.

Eleventh Answer:

I have no knowledge except from the record book of the minutes of the association and other memoranda heretofore cited.

Twelfth Answer:

I have no knowledge on the subject.

Thirteenth Answer:

No knowledge on this point.

J. STODDARD JOHNSON.

Sworn to and subscribed before me by J. S. Johnson.

THO. P. SMITH, *N. P., J. C.*

441 *Answers of Claudius Duval.*

Also, the deposition of Claudius Duval, taken at his office in the city of Louisville, Kentucky, on the 27th day of May, 1880, to which time and place the taking was adjourned, to be read as evidence for the same parties in the same suit in equity, as mentioned in the caption hereof, and taken in like manner, neither party, agent, or att'y being present.

In answer to complainant's interrogatories-in-chief, the witness, after being duly and lawfully sworn, says:

First Interrogatory. Answer:

My name is Claudius Duval; age, 66 years this day; and am a retired merchant, now engaged in editing, or assisting to edit, a literary journal, and am an old citizen of Louisville of 44 years, and now reside in said city; formerly from the State of Maryland.

Second Interrogatory. Answer:

I did know Charles Fenton Mercer and Geo. Hancock, both deceased, and do know compl't Preston. I knew them all well, having transacted business with each. I knew the two deceased
442 parties for many years before they died, and have known

Gen'l Preston since about, or shortly after, I came to Louisville to live.

I have knowledge of the joint stock company known as the "Texas Association" since about the year 1852, as at that time I purchased stock in said association.

My information and belief is that the association was gotten up and organized by Gen'l Mercer, who was its chief manager and agent until he was succeeded by George Hancock. I knew said Hancock as the chief agent or officer of said association from about the year 1852, and he continued so to act to the time of his death, and he was succeeded by Gen'l William Preston, who has been the chief agent and manager from that time, and is now the chief agent and manager of its business and affairs.

About the year 1852, as well as I now remember, or it may have been 1853, at the solicitation of said Hancock I purchased an original certificate or two shares of stock in the "Texas Association" belonging to a party in Philadelphia or New York from said Hancock, for which I paid, as well as I now remember, the sum of
443 $375.00 in cash. In the year 1858 said Hancock, being then the chief agent and manager of the business and affairs of said "Texas Association," I became the secretary thereof. My predecessor was Geo. W. Anderson, who resigned. I continued in office until the death of said Hancock in 1875, and for four years afterwards, when I resigned, and was succeeded by Col. M. L. Clark, who is now the secretary thereof; and during all the time I was in office, and to the day I gave it up, I had charge of the books and papers of said association, the object and purpose of which was to colonize the Mercer grant in Texas, as set forth in the agreement made between Gen'l Ch's F. Mercer and Gen'l Sam Houston, the then President of the Republic of Texas, which agreement was printed on each certificate of stock issued by said association, and, in addition, each certificate of stock had upon it a map of the Mercer grant marked with a star at the head of the agreement. Such certificates as these all of the original subscribers and stockholders held, and such were recognized by Col. Hancock as the Mercer grant certificates.

Third Interrogatory. Answer:

444 I have examined the printed paper attached to and made part of this question, headed "Texas Colonization," signed "C. F. Mercer, Chief Agent of the Texas Association," and dated Sept. 20th, 1844, and upon which also appears some manuscript signed "C. F. Mercer, of Tallahassee," with the date, Dec. 10th, 1844. I am acquainted with and know the handwriting of Charles Fenton Mercer; the said Mercer's signatures and the manuscript endorsement referred to are genuine and in his own handwriting. Said Mercer is dead. I cannot remember when he died.

Fourth Interrogatory. Answer:

I have also examined the paper or papers particularly described in

this question, which paper is here referred to and made part of this deposition and is attached to the question. I have before stated that I know the handwriting and signature of Chas. F. Mercer. I am also acquainted with the handwriting and signature of G. Washington Anderson, but I don't know Taylor's handwriting. The signatures of said Mercer and of G. Washington Anderson appearing on the first page of said paper are genuine, and are in the respective handwriting of said Mercer and said Anderson. Said Ander-
445 is also dead. He died some ten or fifteen years ago. I cannot remember the exact time. The paper is doubtless genuine. Anderson was secretary of the association at the time and continued to act as such until I succeeded him, as I have before stated. I know nothing special as to the history of said paper. It is such as was originally issued to shareholders. The blanks are filled partly in the handwriting of Anderson and partly by Mercer, as I believe.

Fifth Interrogatory. Answer:

I have also examined the printed or lithographed map, called map of the Mercer Colony in Texas, May 1st, 1845, scale 20 miles to the inch. I don't know that I ever saw this identical map before. I have no recollection of it, but I know all of the old certificates of stock issued by Mercer were printed on a large two-leaf paper and contained the certificate of the shareholder, a map similar to the one referred to, styled in the corner "Map of the Mercer Colony in Texas, May 1st, 1845," and a printed copy of the contract between Mercer and Houston, and I know that many of these certificates were on file in the office when I became secretary of the association, and are still with the papers of said association. I have no
446 copy at my command at this time, but I have seen numbers of them, all corresponding with the one attached to the question.

There were and still are some shares issued by Col. Hancock without the accompanying map of the colony lands endorsed on the back. These were issued about 1854, and this was done because all of the original blank certificates for shares were exhausted, and the plate or engraving of the map could not be obtained. Since about 1854 no certificates were issued with said map accompanying them. I believe Mercer also had some certificates printed without maps, after the first issue was exhausted.

Sixth Interrogatory. Answer:

I have also examined the third and fourth pages of the paper referred to as an exhibit with this question. The signatures of C. F. Mercer to these papers are genuine and in his own handwriting, and the paper is genuine; but I am not personally acquainted with the handwriting of E. H. Taylor. Said Taylor is also dead. I knew him: he was cashier of the Bank Ky. at Frankfort.

Seventh Interrogatory. Answer:

I have very recently looked over the papers of the Texas
447 Association, for the purpose of refreshing my memory. Amongst these papers I find a certificate for one share issued to the late Daniel Doup. It is signed with the genuine signature of G. W. Anderson as secretary, and who was the then secretary of the association, and witnessed by D. P. Faulds and Joseph Barbaroux. These witnesses are now living. It is dated December 15, 1852, showing that the sale and assignment was made by Chs. F. Mercer, original grantee, on the 27th Feb'y, 1852, and acknowledged before Pendleton Pope, Commissioner of the State of Texas, and assigning all of his interest in the annexed contract to George Hancock. This paper has also an endorsement of said Pope, dated Dec'r 16th, 1852, under his official seal and signed by him. There is also endorsed on the back of said certificate a memorandum, which I recognize as my handwriting, dated Nov. 17th, 1871. This paper also has the colony map engraved upon, a copy or similar map to the one attached to these interrogatories, and is the same as all the other old certificates referred to, and is like the certificate issued to me when I purchased my stock, and is the same in form to that issued to E. H. Taylor, cashier Bank of Kentucky at Frankfort. I make these statements to show time when Hancock became
448 the chief agent of the association, which was in Feb'y, 1852, and from that time until his death he was recognized as such chief agent and manager, and since his death Gen. Wm. Preston, as before explained. I am a stockholder in the association.

Eighth Interrogatory. Answer:

I know nothing personally about Genl. Mercer settling or colonizing parties in Texas of my own knowledge, but understood and believe he had the same difficulties as the Peters Colony. I bought with the expectation that the Mercer claim was a good one and would be settled as the Peters company was afterwards settled. I always regarded the Mercer claim as similar to the Peters company claim. I was so informed by men who had opportunities of information on the subject, and it was a notorious and recognized fact that Mercer had done everything in his power to introduce settlers in Texas, but know nothing of the persons introduced and settled of my own knowledge, or of the particular facts concerning the settlement. I was never on the land.

I have already stated that Col. George Hancock was chief
449 agent of the Texas Association in 1852, and I know he was the chief agent thereof from that time until his death, and he was recognized by the association as such; from and since the death of said Hancock, General Wm. Preston has been the chief and recognized agent of the association and is still acting as such. Col. Hancock made many efforts by personal visits to Texas, engaging able counsel and spending large amounts of money, to establish the claim, and also by correspondence. I know the business pertaining

to the association occupied him mainly for a number of his latter years, the accomplishment of which was one of his chief objects, and he never doubted of his final success. For his energy and efforts in this respect he received the thanks of the association, as is shown by their records.

Ninth Interrogatory. Answer:

I have been informed and always understood the fact to be that the State of Texas did recognize the Mercer Colony grant and contract as a valid agreement and of the same nature as the Peters contract. The stock has always had a marketable value in Louis-
450 ville, Ky. It has been sold at chancery sales made by decrees of the Louisville chancery court; also, as I believe, at bankrupt sales under proceedings of the U. States courts, and by private parties here and elsewhere, as is shown by the transfer book of the company. After 1852, say about the years 1856 and '57, or about the time the Peters Colony was settled, the stock in the Texas Association (Mercer stock) was held at high prices, some persons estimating it at twelve hundred dollars upon the basis of the original stock.

Some of this stock has been sold in this market during the last year, but I cannot state at what price.

Tenth Interrogatory. Answer:

I believe I have stated all the material facts within my knowledge touching the subject in controversy, and don't know that I can add anything more.

In answer to cross-interrogatories the witness states as follows:

First Cross-Int'y. Answer:

451 I am a stock or share holder only. I have stated what connection I had with the association. I only own some 12 or 14 shares or certificates of stock at this time. I acquired a part of them by purchase as stated. Some of it was voted to me for my services as secretary, which was the only compensation I received for my services. I have at different times owned some 25 or 30 shares by purchase and for services as secretary. I gave some of this stock to my children and sold some. Before I resigned my position as secretary of the association, in March, 1879, there was a called meeting of the shareholders, and the following parties responded to that call, and I believe they are all shareholders in the association. They are: Rev. James Craik, J. A. Nunes, Wm. Rienake, J. M. Shreve, P. Bland, Cocke, C. U. Shreve, H. Burkhardt, Dr. S. D. Mills, J. E. Sutcliff, James Buchanan, Preston Rogers, R. M. Moseby, E. J. Carl, Geo. A. Owen, Thomas Pearson, R. T. Durrett, C. Duval, Mrs. C. H. Bent, Mrs. L. Powell, S. S. Kennedy, William Terry, E. D. Briscoe, L. Washburn. These are all in the city of Louisville and county of Jefferson, Kentucky. Grant

Wykoff, of New York; Wm. Preston, of Lexington, Ky.; Ralph Crane, whose residence I do not know, also my children, are shareholders. These are not all. There are others Col. Hancock's representatives or devisees own stock also, and there are many others scattered through the country, but I cannot remember
452 who they are, and the books are not in my possession at this time, and I cannot give the names. There were some six or seven hundred shares sold, but who now represent them I cannot tell further than above. There are as many as thirty or forty shareholders in all, perhaps more. I cannot name them all, because I have not the books or information at hand to enable me to do so. All of the facts I have stated came to my knowledge through my connection with the association, as I have fully explained.

Second Cross-Int'y. Answer:

I cannot give the dates further than I have already given. Col. Hancock died at his residence in Jefferson county, Ky. Don't know when Gen'l Mercer died.

Third Cross-Int'y. Answer:

I never met him in the State of Texas; I only knew him in Louisville. Can't remember the date. At that time he was living on a farm in this State upon the Kentucky River. I do not know personally what he was then engaged at, nor can I remember how long this was before his death. I had business transactions with him at the time; I sold him goods for his home supplies.

453 Fourth Cross-Int'y. Answer:

I know nothing about the original organization of the Texas Association. It was organized before I had any knowledge of it. I cannot give any information on the subject before 1852.

Fifth Cross-Int'y. Answer:

I was. The first meeting of the association I ever attended was held at the Galt House, in the city of Louisville, and was adjourned from there to my house, at the corner of Third and Walnut streets, on the 18th Sept., 1858. The persons present at that meeting were Geo. W. Anderson, Jesse Bayles, Dr. L. Powell, H. H. Timberlake, and myself, and perhaps others. At this meeting I was elected the secretary of the Texas Association, and it was determined to issue new certificates to shareholders in the place of those previously issued by C. F. Mercer, to which I have referred. These certificates were too large in amount and inconvenient, and in lieu of them it was determined to change or alter them from $500 to $100 each. The news from Texas about this time was very favorable for a speedy and
454 satisfactory settlement, and the change in the stock, certificates, or shares was thought to be advantageous, because more easily handled and convertible, and it was determined to issue twelve hundred certificates instead of one hundred original certificates, and under these proceedings the Texas Association issued new certificates,

which were signed by the president and secretary of said association, and I now file herewith, and make the same a part of this deposition, one of said new certificatas, dated 21st Oct., 1858, and issued to Geo. W. Anderson, with the words "One hundred dollars" printed in large letters upon its face. The other certificates were like this. For identification I mark this paper C. D. No. 1. From the report made by Col. Hancock to said association it was understood that the proof would show that Gen'l Mercer had placed some 1,200 or 1,300 families within the grant, and that each share of stock would represent one section of one square mile or more of land.

The next meeting of said association was held on the 18th of Nov., 1858. It was held at my home in the city of Louisville. There were present at this meeting Jno. B. Banc, George W. Anderson, Jesse Bayles, H. H. Timberlake, W. Burkhardt, and myself.

455 It was held in pursuance of a call published in the papers. The object of this meeting chiefly was to adopt or reject the certificates as engraved and prepared, some of which had been issued, and these certificates were objected to. I refer to such as are mentioned above and marked C. D. No. 1, and the meeting ordered others to be issued instead, and another form was adopted. The last certificates were such as I now herewith file as a part of this deposition, marked C. D. No. 2, dated same day, Oct. 21, 1858, and signed Geo. Hancock, president, C. Duvall, secretary.

On the 25th March, 1859, another meeting was held at my house; present, Dr. L. Powell, H. H. Timberlake, Geo. W. Anderson, Henry Burkhardt, Jesse Bayless, and myself. The object of this meeting was to receive a report from a committee which had been appointed to confer with Mr. Cabell in reference to certain changes or alterations made in relation to stock, &c., of the association, and to procure his services or to solicit his co-operation in reference to the association, all of which he approved.

456 The next meeting was held in the city of Louisville, May 28th, 1859; present, J. B. Bland, Wm. Burkhart, H. H. Timberlake, Grant Wykoff, and myself. The object of this meeting was to receive a communication from R. B. Richardson and his associates to attend to the interests of the association before the legislature in Texas.

The next meeting was held at the Galt House in the city of Louisville, Nov. 4, 1869. Present, Geo. Hancock, H. Burkhardt, Dr. L. Powell, Geo. A. Owen, W. B. Bland, Tho. Pearson, R. A. Mosby, Dr. J. E. Sutcliffe, and myself; Geo. Hancock, president, in the chair. The chief object of this meeting was to receive a statement from Hancock as to the condition of the affairs of the association and to consult in relation thereto, and said Hancock was authorized to employ counsel and prosecute the claim of the association in Texas.

The next meeting was held in the city of Louisville on the 29th October, 1871, in pursuance of a published call. Present, Geo. Hancock, H. Burkhart, R. N. Mosby, Dr. J. E. Sutcliffe, and myself.

The object of this meeting was to take action in relation to compensation of Richardson and his associates and as to the prosecution of the claims in Texas. At this meeting James C. Johnson was elected vice-president of the association. He is also dead.

457 There were also a large number of other meetings of the association held in the city of Louisville at different times, in all of which I was present. They were called and held for the purpose of transacting the general business of the association, and to set out each meeting at length would be too long and tedious to incorporate in this deposition. The last meeting which I attended was held in the city of Louisville, at the office of the association in said city, on the 16th March, 1879. There were two subsequent meetings held at the same place in the city of Louisville, but I was not present at them. The records show that one of these was held 7 May, 1879, and the other on the 20 January, 1880.

Sixth Cross-Int'y. Answer:

I don't know that he was; the books of the association do not show that he was. He had transferred his interest to Hancock before his death, as I have stated. As to the meetings of the shareholders of the association, I have referred to above.

Seventh Cross-Int'y. Answer:

Geo. Hancock was the acting and chief agent of the association when I became interested in it, in the year 1852, as well as when

458 I became the secretary thereof, in 1858, and he continued so to act till the time of his death. In 1854 I received a letter from him dated Austin, 28 January, 1854, concerning the business of the association and also of the stock I had purchased in the association. I file this letter as a part of this deposition, marked C. D. No. 3. It is wholly written and signed in the handwriting of said Hancock, and shows that he was then in Texas acting for the association. When or how he was appointed I cannot state.

Eighth Cross-Int'y. Answer:

I have said that Hancock was such chief agent to the time of his death, and was recognized as such. All the persons who met with us at the various meetings held prior to his death, and all other stockholders with whom I have met, so recognized him, and the records and acts of the association so recognized him. He signed the certificates of stock as such, and I, as the official secretary of the association, also recognized him as such. My answers show the source of my information.

Ninth Cross-Int'y. Answer:

I do. He acted as such during all the time I acted as sec-

459 retary, and to the time of his death, both in Kentucky and in Texas. The letter to which I have referred shows that he was so acting in 1854 in Texas, and I know he made a number of trips there in the interest of the association whilst I was secretary.

My official connection with him gave me personal knowledge that he did so act. I can't state when or where he was elected or appointed. I found him so acting when I became connected with or interested in the association, and he continued to so act until his death, and his right and authority thus to act was never questioned, but was on all and every occasion recognized by the association.

Tenth Cross-Int'y. Answer:

I know nothing about the acts of the Texas Legislature. There were many sales and transfers of stock in said association. I have personally alluded to some. I cannot say how many, but a large number; nor can I say to whom or at what prices. I sold and transferred two shares of the stock of the association some years ago to Mr. Gaar, at about $150 or $160 per share. What other
460 persons sold at I do not know, nor do I remember what the stock brought at judicial sales; and I also know that to this date $50 per share has been offered and refused.

Eleventh Cross-Int'y. Answer:

I have in a previous answer given the names and residence of such of the shareholders in the association as are known to me. I know that these parties are stockholders because I issued them the stock, or know of the transfer of the stock to them, but I cannot accurately give the amount owned by each party, or the names of all the owners.

Twelfth Cross-Int'y. Answer:

I know nothing of this whatever. I was not interested in the association at that time.

Thirteenth Cross-Int'y. Answer:

I did not and do not know anything of this.

My attention has been requested by the officer taking this deposition to certain papers and documents about which I consider it my duty to speak in further answer to interrogatory No. 10 in
461 chief, as they may be material upon the questions involved in this controversy.

I have stated that there was a meeting of the stockholders of the Texas Association held in Louisville, Ky., on the 13th day of March, 1879. A printed copy of the proceedings of that meeting, which is certified by me as the acting secretary of the association at that time, is now before me, and for identification the same is marked C. D. No. 4, and is made a part of this deposition. The statements therein are true.

I also know that Geo. Hancock went to Texas in the winter of 1872–3, on business connected with the association, and that he laid before the legislature of that State a memorial touching the Mercer grant; a printed copy of the memorial, which was found amongst the papers of the association, is marked C. D. No. 5 for identification,

and is attached hereto and made a part of this deposition, the object and purpose of which is fully explained by the paper itself.

I also have before me the petition of Virginia E. Robinson and Margaret H. Bailey to the Texas Association, respecting certain stock in the association claimed by them under a paper attached to
462 said petition, and which reads as follows:

"I hereby certify that at the request of Thomas Heywood, Esq., of Tallahassee, in the State of Florida, that his deceased son, Robert Heywood, had at the time of his death, and prior to my transfer to Col. George Hancock of Kentucky of all of my interest in the grant hereafter mentioned, paid me in full for his share of stock held in the company I formed for the colonization of part of the territory of the then independent Republic of Texas, being six thousand square miles of the said territory, for that purpose, in 1843, by Sam Houston, President of the said Republic, by indenture attested by the Secretary of State thereof.

(Signed) C. F. MERCER.

Tallahassee, Fla., May 19, 1857."

As I have stated, I know the handwriting of C. F. Mercer, and the paper of which the above is a true copy is wholly in the handwriting of said Mercer, including signature and date.

CLAUDIUS DUVAL.

Sworn to and subscribed before me.

THO. P. SMITH, *N. P., J. C.*

463 Exhibit marked "C. D. No. 1" to foregoing depositions of Claudius Duval, and filed and read on the hearing as part thereof:

Shares $100 each. Grant 1844, by the Republic of Texas.

Texas Association, No. 1.

8,000 square miles on the Trinity River.

This certifies that George W. Anderson is entitled to one share of stock in the "The Texas Association," established for colonizing certain land in Texas under the authority of the Republic. Said share of stock is transferable in person or by attorney on the books of the association upon the surrender of this certificate.

This certificate of stock is not liable for any call except it become necessary for charges of survey of lands acquired by the association.

In witness whereof is affixed the signatures of the President and Secretary this 21st October, 1858, at Louisville, Ky.

GEO. HANCOCK,
President.

C. DUVAL,
Secretary.

464 Exhibit marked "C. D. No. 2" to foregoing depositions of Claudius Duval, and filed and read on the hearing as part thereof:

Grant 1844, by the Republic of Texas.

Texas Association No. 46.

8,000 square miles on the Trinity River.

This certifies that Claudius Duval is entitled to one share of stock in the "Texas Association," established for colonizing certain lands in Texas under the authority of the Republic.

Said share of stock is transferable in person or by attorney on the books of the association upon the surrender of this certificate.

This certificate of stock is not liable for any call except it become necessary for charges of survey of lands acquired by the association.

In witness whereof is affixed the signatures of the President and Secretary this 21st Oct., 1858, at Louisville, Ky.

GEO. HANCOCK,
President.

C. DUVALL,
Secretary.

465 Exhibit marked "C. D. No. 3" to foregoing depositions of Claudius Duval, and filed and read on the hearing as part thereof:

AUSTIN, 28 Jan'y, 1854.

DEAR DUVALL: The judiciary committee have reported in our favor, and on to-morrow our claim will pass the Senate, I think. I hope to have it a law before I leave. All admit that we must succeed, and I expect 5 to 6 sections of land for each share of stock.

I sold you 2 shares of Crane's stock. He seems dissatisfied, from what I can learn, that it was sold. I wish no difficulty with him, and have to-day written to him that he could either agree to it, or I would give him two shares of my own stock in lieu of it. This, of course, he must be satisfied with.

I will leave in 8 or 10 days for Louisville. All well.

Yours truly,

GEO. HANCOCK.

C. DUVALL, care BEAL & DUVALL,
Louisville, Ky.

466 Exhibit endorsed "part of C. Duvall's deposition taken by me 27 May, 1880, Tho. P. Smith, N. P., J. C.," and filed and read on the hearing as part of said depositions:

Extract from the record book of the proceedings of the meeting of the Texas Association:

LOUISVILLE, KY., March 13, 1879.

In pursuance of a call in the Louisville *Courier-Journal* of this date, a meeting of the Texas Association was held at the Galt House. The following stockholders were present: Gen. William Preston, Col. R. T. Durrett, Col. J. A. Nunes, Wm. Reinecke, J. M. Shreve, P. Bland, Capt. Wm. Johnson, H. Burkhard, Wm. Terry, Dr. S. D. Mills, and C. Duvall.

Gen. Wm. Preston took the chair as president and C. Duvall as secretary. The meeting being fully organized, Gen. Preston then addressed the stockholders, giving a history of the association from its inception, and setting forth fully what action had been taken in order to secure a fulfillment of the contract on the part of the State of Texas, presenting a full report of our late president, Col. Geo. Hancock, up to the year 1874. After being read was, on motion of Col. R. T. Durrett, submitted and ordered to be recorded.

467 Gen. Wm. Preston submitted the contract of Col. George Hancock with himself, to be disposed of by the stockholders of the Texas Association in any manner they may think proper, and then vacated the chair, when, on motion, which was carried, Col. R. T. Durrett was called to the chair.

On motion of Mr. Wm. Terry, it was resolved that the said contract be approved and fully accepted by the association, and confirmed in all its details; unanimously adopted; after which Gen. Preston resumed the chair.

On motion, made and carried, the secretary was instructed to procure a copy of Col. Hancock's will from the County Court, and spread it upon the minutes of the association.

On motion of Col. R. T. Durrett, a committee of three (two with the secretary) be appointed to report a list of all the stockholders, and the number of shares held by each, and to report the proper basis of voting stock; carried. Whereupon the chair appointed Col. R. T. Durrett and Chas. M. Shreve, with C. Duval, secretary.

On motion, made and carried, the meeting adjourned to meet at the law office of Col. R. T. Durrett, to-morrow, March 14, at 3 o'clock p. m.

(Signed,) W. PRESTON, *President.*
C. DUVAL, *Secretary.*

A copy from the record-book of proceedings and meetings of the Texas Association.

Attest: SECRETARY OF TEXAS ASSOCIATION,
C. DUVAL, at date of above meeting.

468 Exhibit to depositions of Claudius Duval, marked "C. D. No. 5," and filed and read on the hearing as a part of said deposition:

AUSTIN, January 29, 1873.

To the Honorable Senate and House of
Representatives of the State of Texas:

Your memorialist, George Hancock, a citizen of Louisville, Kentucky, desires, in behalf of himself and associates, to obtain permission to establish in the courts of your State a claim against Texas.

On the 4th day of February, A. D. 1844, President Houston entered into a contract with Charles F. Mercer for the introduction of colonists into what was afterwards known as Mercer Colony. To the fulfillment of that contract Mercer devoted untiring energy, and with signal success, as the history of the times will show. He expended large sums of money and bestowed much time in introducing men into the country, and under the authority of his contract with President Houston a company was formed known as the "Texas Association," of which your memorialist is president and trustee.

469 In the progress of time dissensions grew up between the colonists and Mercer and his associates, attended with results which always follow controversies, when the few are opposed to a multitude. The political jealousies which from time to time embarrassed General Houston in his colonial policy resulted in leaving Mercer without relief. The Legislative Department, while securing protection and quiet to the colonists, failed to provide for the just claims of Mercer, who, after exhausting his means in colonizing the country, was compelled to wage an unequal contest for his lands with the settlers, or abandon his claim to lands within the limits of the colony. He chose the latter course, and quietly awaited the result of similar difficulties in Peters's Colony before applying for relief. The late war soon followed, and we now apply, for the first time, for justice through your own courts on a contract made with the Republic of Texas. *Not one single dollar nor an acre of land* has ever been received by Mercer and his associates from Texas, while the archives of the government will show that thousands of dollars were expended by him, and a large number of families introduced under his contract. Your memorialist asks the privilege of showing in the

470 courts of the country that whenever Mercer failed to comply with the details of his contract, he was prevented by the condition of the country or the action of the constituted authorities. We ask for no money, but for the privilege of locating in the wilderness such certificates as we may be entitled to.

Mercer and myself were the friends and companions of General Houston in his boyhood, and relied on his assurance that Texas would yet do us justice. Of the three, your memorialist alone is left, and now comes to ask Texas, in the days of her prosperity and power, to permit her courts to determine what equitable measure of relief shall be afforded for services rendered in her time of trial and need.

Respectfully,

GEORGE HANCOCK,
For self and associates.

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471 *Answers of Thomas H. Taylor.*

Also the deposition of Thomas H. Taylor, taken the same office of the notary, in the city of Louisville, on the 28th of May, 1880, to be read as evidence for the same parties in the same suit in equity, as mentioned in the caption to J. Stoddard Johnson deposition, under the same agreement and in answer to the same interrogatories accompanying said Johnson's deposition, the deposition being taken in all respects like that of said Johnson, the witness being first duly and lawfully sworn, neither party, agent, or att'y being present.

The witness answers the interrogatories and cross-interrogatories as as follows, to wit:

Interrogatories-in-Chief.

First Answer:

My name is Thomas H. Taylor; was born in Frankfort, Ky., in 1825; am a citizen of Louisville, Kentucky, and have been for several years last past, and am now, a deputy United States marshal for the district of Kentucky, and have been so employed for three or four years past.

472 Second Answer:

I only knew General Mercer by repufation, but had a personal acquaintance with Col. George Hancock. Knew him a number of years before his death. Have known Wm. Preston 40 years or more.

Third Answer:

All that I know on the subject personally is that my father, Col. Edm'd H. Taylor, owned stock or an interest in the "Texas Association," which I understood was organized or formed by Gen'l Mercer in his life-time, who was at the head of it for some time, and that later I know Col. Hancock was the manager of its affairs, and that at this time Gen'l Preston is at the head of it; but I can give no information in detail about it, as I never had any business connected with it.

Third Answer:

All I know on this subject will appear in my next answer. I do not know the signature or handwriting of Gen'l Charles Fenton Mercer.

Fourth Answer:

The paper which is particularly alluded to and described
473 in this int'y and is attached to the question, is before me, and I have examined it and now refer to it and make it a part of this deposition. As to the signature and writing of Gen'l Mercer, I can say nothing. The signature of G. Washington Anderson appearing on the first page is his genuine signature. That of my

father, Edm'd H. Taylor, to the contract or agreement of the 13th day of March, 1846, is the genuine handwriting of said Taylor. G. Washington Anderson was well known to me. From papers in my possession, I can state that said Anderson was at one time the secretary of the "Texas Association." He has been dead some 12 or 15 years. The precise date I don't remember.

A short time ago, about three or four months, as well as I now remember, I gave to Gen'l Preston several papers or documents which were in my father's possession at his death, and which I obtained from his papers, referring and relating to the Texas Association, and this particular paper was amongst them. I know nothing further in relation to the history of the paper, than that I knew my father was interested in the Texas Association, and I supposed this paper was the evidence of the fact. It was sent to me by my stepmother, and I gave it to said Preston or his att'y, and it
474 was doubtless in my father's possession from the time of its execution until his death, which occurred in 1873, and remained with his papers until my stepmother sent it to me. There was also found amongst my father's papers a letter from G. Washington Anderson to my father, dated Louisville, 23 Aug., 1852, which is marked "A No. 1," and is filed herewith as a part hereof. It is in Anderson's handwriting.

Fifth Answer:

I have also examined the map, being the second page of the paper referred to, which map is correctly described in this question.

I have seen a substantial copy of said map, perhaps a literal copy; it was also found amongst my father's papers, and I here produce it, marked on the back with my initials to identify it, and on which I have written my name, and I make the same a part of this my deposition. This paper was unquestionably amongst my father's papers for many years. I knew as far back as 1848 that my father was interested in this association, but I did not know the extent of his interest; about the year 1853–4 I was talking about leaving
475 Kentucky, and had some conversation with my father about his Texas Association interests with a view of locating there or elsewhere, and I then saw in his possession some papers in relation thereto, and I distinctly remember seeing some maps connected therewith, and I believe I then saw the papers alluded to in the 4th int'y, and also the map now filed; in fact, I have little or no doubt on the subject, but the lapse of time has been such that I cannot positively state that they are the same; all of these papers were obtained by my stepmother, from amongst my father's papers, and she sent them to me.

Sixth Answer:

I have also examined the paper particularly described in this question, and now refer to it and make it a part of this deposition. I have stated that I know nothing of Mercer's handwriting, but I do

know that the signature of Edmund H. Taylor thereto is in his handwriting; the endorsement thereon is also in the handwriting of said Taylor, except the signature of Geo. Hancock, which is said Hancock's signature. I have stated all the facts in relation to this paper which I consider material, which are within my knowledge.

Seventh Int'y. Answer:

476 I can't say when Gen. Mercer's connection with the association ceased, or when Col. Hancock's commenced. I know that Col. Hancock was for a long time connected with it as manager, but of particulars I cannot speak, and I know that Gen. Preston is now the head and manager, but I cannot state the particulars as to how. My personal knowledge will not enable me to do so. He is the recognized manager now.

Eighth Int'y. Answer:

I know that Col. Hancock was engaged in the interest of the association a number of years, and I had conversations with him on the subject. He made trips to Texas in the interest of the association, and I believe was earnest and industrious in his efforts; but I cannot give particulars. The remainder of this question I have answered, so far as I am able to answer.

Ninth Int'y. Answer:

I know nothing of my personal knowledge.

In answer to cross-interrogatories:

477 First Cross-Int'y. Answer:

I am not a member of the association and never was, and have no interest in the matters in controversy. My father's interest, whatever it was, passed to my stepmother. I never owned any stock in the association; never attended any of its meetings; know nothing of a personal nature touching its organization or management further than I have mentioned; cannot state who the shareholders are or who the officers were further than I have stated.

Second Cross-Int'y. Answer:

I don't know, except Col. Hancock died in Jefferson county and within the last 4 or 5 years. Don't remember the exact date.

Third Cross-Int'y. Answer:

I don't remember ever to have seen him anywhere.

Fourth Cross-Int'y. Answer:

I was not, and took no part in it.

478 Fifth Cross-Int'y. Answer:

I never was, and don't know.

Sixth Cross-Int'y. Answer:

I know nothing.

Seventh Cross-Int'y. Answer:

I know nothing on these subjects further than I have stated.

Eighth Cross-Int'y. Answer:

I have said that Hancock was recognized as the manager for a time, and that Preston is now the manager of the association. I have talked with both Hancock and Preston on the subject, and know personally of their acting for the association. Beyond this I know nothing.

Ninth Cross-Int'y. Answer:

I cannot give the facts from personal knowledge. All the knowledge I had on the subject was obtained from Hancock himself and from his acts. I know he went to Texas, and also that Preston went there in the interest of the association; but I never was an officer of the association and never had access to their records, and cannot state how or by what authority either of them so acted.

479 Tenth Cross-Int'y. Answer:

I have not said so.

Eleventh Cross-Int'y. Answer:

I know nothing.

Twelfth Cross-Int'y. Answer:

I do not know it.

Thirteenth Cross-Int'y. Answer:

I have no means of knowing what they knew.

THOS. H. TAYLOR.

Sworn to and subscribed before me.

THO. P. SMITH, *N. P., J. C.*

480 Exhibit marked "A No. 1" to deposition of Thos. H. Taylor and filed and read upon the hearing as a part thereof, as follows:

LOUISVILLE, 23 Aug., 1852.

DEAR EDMOND: As you have mislaid our first circular, I enclose herewith another copy.

Each share of stock to renew the enterprise of the association is assessed $100. Mr. Hancock deems the amount thus produced, after consultation with agents in Texas on the subject, sufficient to carry through the enterprise. If successful, however, of which I have not the least doubt now, we shall be at the charge, as the Peters company are, of sectionizing the lands which may be awarded us. The expense of the survey will probably cost fifteen hundred or two

thousand dollars, and, of course, would have to be raised by an assessment upon the stock, which I presume no stockholder would hesitate to submit to.

About 14 shares, including yours, have been favorably responded to. We think the second circular will in a few days bring the answers of all. We presume many of the stockholders were absent,
481 especially those in Florida, where a large number reside, when our first circular was issued. This was the case as to C. H. Dupont, who holds three shares, and from whom we only heard last week. If the residue, however, will only give us the privilege of using their names, we will find the means necessary to prosecute the enterprise here. If they will not do this, nor contribute anything more, as we have said in our second circular, we will not present their names at all as having part and lot in the matter to the Legislature of Texas; they may pursue their own interest in the premises as they may think best. We do not require any formal authority to use the names of these stockholders who accept the scheme for the renewal of the enterprise. Their acquiescence, which is attested by the payment of the assessment, is all that is necessary.

Major Riley, who you know, (he married Ellen Ross,) passed here on his way to the Baltimore convention. He told me he had not a doubt of our success, and would give his influence with great pleasure, when the matter was brought before the Legislature, to secure it. Gen'l Johnson, now in command of the various military posts in Texas, and the nephew-in-law of Hancock, and who fought
482 through the Texian war, a man of no inconsiderable influence, pledges his best exertion in its behalf. So does Gen'l Ward, with whom Gen'l Hancock is very intimate, and who heretofore, because of his unfriendliness to Gen'l Mercer, has opposed the grant.

Hancock is now in correspondence with Senator Rusk, who he knows intimately, upon the subject. We shall leave no stone unturned to accomplish success. Hancock will leave in October for Texas. My best and affectionate regards to Martha's family. Have you heard anything from Thomas? I hope he has arrived safely and has been fortunate in his enterprise. We are all well.

Yours, sincerely,

G. WASHINGTON ANDERSON.

The second exhibit to the depositions of Thos. H. Taylor, endorsed "part of Thos. H. Taylor's deposition, taken by me 28 May, 1880, Thos. P. Smith, N. P., Jeff. co.," and filed and read upon the hearing, is a map of the Mercer Colony in Texas, identical in all respects to the map before put in evidence and heretofore inserted on page 190½ of this record.

483 And the complainant also produced and read upon the hearing the depositions of J. W. Lawrence and P. De Cordova, as follows:

Interrogatories to P. De Cordova and J. W. Lawrence.

U. S. Circuit C't, at Austin, Tex.

George Hancock
v.
J. S. Groos. } No. 98. Chancery.

Interrogatories to P. De Cordova, J. W. Lawrence and L. E. Edwards:

One:

What is your age and place of residence?

Two:

What is your occupation, and how long have you been engaged in it, and where?

Three:

What is the nature and character of your duties in such business, and what opportunities, if any, does or did it give you of learning the past or present value of land and land certificates in the State of Texas?

Four:

Do you know, in a general way, what counties, or parts of
484 counties, and what portion of the State is embraced, or supposed to be embraced, within the limits of Mercer Colony? If so, state in general terms in what portion of the State, and between or near what rivers (if any), is the said Mercer's Colony situated, and what counties or parts of counties are embraced, or supposed to be embraced, within these limits?

Five:

If you say the counties of Navarro, Ellis, Henderson, Hill, Collin, Fannin, Hopkins, Freestone, and others, and parts of these counties and other adjoining counties are embraced in the limits of that colony, state what was about the average value per acre of land vacant and otherwise within these limits; say from 1844 to 1848, and from 1848 to 1850. What was and is the general quality of the land in Mercer's Colony as compared with the land in Peters's Colony, and with the balance of the State? How in point of value did it and will it compare with land in other parts of the State?

Six:

State, if you know, what from 1844 and 1845 or 1846, and from then to 1852 or 1854, was about the value per acre of genuine 640-acre certificates or 320-acre certificates, where such certificates
485 would patent direct to the assignee. State what is the present value of such certificates per acre, and if there is any differ-

ence in the value, state what is the difference and what causes the difference. Be full and particular on this point.

Seven:

What is a 640 or a 320 certificate now worth in the market where a patent will issue on it direct to the assignee?

Eighth:

State anything further in this connection that you may know as to the past value of lands in Mercer Colony, and also as to the present value of lands there, and as to the present and past value of 640-acre certificates. State all facts you know as to the quality and value of the present vacant land in Mercer Colony, and also in the State at large.

HANCOCK & WEST,
Sol's for Compl't.

18 Nov., 1880.

486 William Preston
No. 98. *vs.* } In Equity.
William C. Walsh.

Cross-Interrogatories to be propounded to P. De Cordova, J. W. Lawrence, and L. E. Edwards.

Cross One:

How long have you resided in Texas? State the different places at which you have resided in said State—the length of time, and in what business engaged.

Cross Two:

Do you know anything, of your knowledge, of the limits or boundaries of Mercer's Colony? If so, state the source of such knowledge, and when acquired.

Cross Three:

If, in answer to direct interrogatories, you state that you were ever in Mercer's Colony, state how often, giving dates and length of time.

Cross Four:

If, in answer to direct interrogatories, you undertake to speak of the value per acre of lands from 1844 to 1848, and from 1848 to 1850, in the counties of Navarro, Ellis, Henderson, Hill, Collins, Fannin, Hopkins, and Freestone, state how you arrive at the value.

487 Is it from a comparison of said lands with lands in other counties? and if so, with what other land is the comparison made? Is the value stated by you the cash value? Is it the market value? and if so, how do you know it to be market value? Do you know anything of the sale and purchase of lands in said

counties at the times enquired of? How many tracts of land, if any, did you ever buy and sell in said counties? and were the sales for cash or on credit?

Cross Five:

If, in answer to direct interrogatories, you state the value of 640 or 320-acre land certificates at the periods, or any of the periods, mentioned in said direct interrogatories, state how you know the value, and whether you mean the actual cash or the market value. If you estimate the value by the sale of certificates, state at what places, and in what markets, and in what quantities, such sales were made.

Cross Six:

Were you ever, in any manner, connected with what is called the Mercer Colony enterprise? and did you ever have, or have you now, any interest, directly or indirectly, in said colony, or in this suit? or are you related to any of the parties to this suit?

488 Cross Seven:

Is it not a fact that for thirty years from August, 1845, or for some other long period of time, the lands within what is called Mercer's Colony were located upon by persons holding land certificates and treated and regarded by the officers of the State and by the holders of certificates as vacant and unappropriated lands subject to location? Did you ever locate certificates on any portion of said lands? and if yea, did you ever hear of any protest or objection on the part of Mercer and his associates to your so doing?

PEELER & MAXEY,
Sol's for D'f'd't.

November 15th, 1880.

Answers of J. W. Lawrence.

In U. S. Circuit Court, Western District of Texas, at Austin.

Geo. Hancock
No. 98 *v.* } In Equity.
J. J. Groos.

Answers and depositions of J. W. Lawrence and P. De
489 Cordova, of the city of Austin, Texas, to the accompanying interrogatories and cross-interrogatories propounded to them in the above-entitled cause, taken before Flavius Everett, a notary public in and for Travis county, State of Texas, in accordance with the accompanying agreement.

J. W. Lawrence answers as follows:

Answer to First Int'y:

J. W. Lawrence, Austin, Texas; I am sixty-five (65) years of age.

Answer to Second Int'y:

Lawyer and land agent since 1847 in Houston and Austin.

Answer to Third Int'ry:

Buying, selling, and locating land and land certificates, examination of land titles, paying taxes and redeeming lands sold for taxes, and generally everything connected with a legitimate land agency in the State of Texas. My opportunities have been and continue to be large for learning the past and present value of land throughout the State of Texas; also, the value of land certificates, past and present.

Answer to Fourth Int'y:

My information in regard to the counties embraced within the limits of Mercer's Colony is derived from the maps on file in
490 the General Land Office. The counties thus represented are portions of Hunt, Hopkins, Rains, Van Zandt, Kaufman, Rockwall, Collin, Johnson, Hill, Navarro, Limestone, Ellis, Dallas, Freestone, and McLennan, more or less of all of them, and probably others not recalled.

Answer to Fifth Int'y:

The value of land in the counties mentioned between 1844 and 1848, I don't know. From 1848 to 1850 their value would range from 50 cents to $2 per acre. The general quality of land embraced in Mercer's Colony is, in my opinion, very far superior, and double the value of the lands within the limits of Peters's Colony, and the value of the land embraced within the limits of Mercer's Colony will compare favorably with the best and most valuable land in the State of Texas.

Answer to Sixth Int'y:

From 1845 to 1846, I know not the value of land certificates. From 1852 to 1854, 320 and 640 acre straight certificates that would patent to assignee sold for 50 cents per acre cash in gold. The present value of such certificates at this date is from $150 to $175 per 640 acres. The difference in value is caused by the small quantity of good land now left belonging to the State, subject to loca-
491 tion.

Answer to Seventh Int'y:

Value stated in answer to 6th Int'y; 320 acres are worth $75 to $80; 640 acres, $150 to $175 per certificate.

Answer to Eighth Int'y:

The value of land in Mercer's Colony has increased largely in value within the past ten years; in some counties, such as Collin, Dallas, Kaufman, Rockwall, Johnson, Hill, Ellis and others, probably as much as one hundred to two hundred per cent; while the value of land certificates have decreased nearly, if not quite, one hundred

per cent. As to the quantity and quality of the vacant land now subject to location in said colony, this deponent saith not. What is left of public lands is generally conceded by land locators to be of greatly inferior value to that subject to location in 1852 and 1854.

J. W. LAWRENCE.

Subscribed and sworn to before me this 26th day of November, 1880.

FLAVIUS EVERETT,
Notary Public, Travis Co., Texas.

492 Answer to First Cross-Int'y:

39 years. Houston and Austin, Matagorda and Galveston; the greater part of the time about equally in Houston and Austin. Engaged principally in a general land-agency business.

Answer to Second Cross-Int'y:

My knowledge of the limits of Mercer's Colony is derived from the maps of the several counties on file in the General Land Office.

Answer to Third Cross-Int'y:

I rode on horseback over many counties represented by said maps as being embraced in the limits of said colony in the year 1851. Did not stop more than a day or two in any one county at that time. In 1873 & 1874, 1875, 1876, 1877, 1878, and 1879 I was many times in the counties of Dallas, Ellis, Limestone, Navarro, Hill, McLennan, Kaufman, and Rockwall.

Answer to Fourth Cross Int'y:

My information in regard to the value of said lands in 1848 to 1850 was obtained from other persons. I never bought or sold any land in any of the counties named. In 1874 I bought one tract of
640 acres in Kaufman co., for which I paid $5 per acre, part
493 cash, balance in 12 months' time. The comparison of value of land in Mercer's Colony with land in other portions of the State was general. I know not of any sales of land made in said colony at an earlier date than 1874.

Answer to Fifth Cross-Int'y:

The sales of land certificates made by me at the prices named were for cash, which was the market value for certificates in Austin. I have sold several thousands of dollars' worth of certificates at one time to one person at the price of 50 cents per acre.

Answer to Sixth Cross-Int'y:

I never was interested or in any manner connected with the Mercer Colony enterprise, or with any of the parties to this suit.

Answer to Seventh Cross-Int'y:

So far as my knowledge of locations of land within the limits of said colony extends, no regard has been paid to the claims of said

colony. Locations were made and patents issued the same as on land in other portions of the State. I have located land in Navarro co., within the limits of said colony, and never heard of any protest or objection on the part of Mercer or his associates.

494 J. W. LAWRENCE.

Subscribed and sworn to before me this the 26th day of November, 1880.

[L. S.] FLAVIUS EVERETT,
Not. Pub., Travis Co., Texas.

P. De Cordova answers as follows:

Answer to Interrogatory 1st:

Phineas De Cordova; Austin, Texas; age 61 years.

Answer to Interrogatory 2d:

Land agent 32 years; Austin city, Texas.

Answer to Interrogatory 3d:

The nature of my duties are as indicated by the business I followed. Buy and sell land certificates and lands, and located lands when I had land certificates, and that gave me an opportunity of learning the value of lands and land certificates, from the year 1848 to the present time.

Answer to Interrogatory 4th:

I know, by reference to Pressler's map of the State of
495 Texas, the section of the State designated as Mercer's Colony. It takes in the west bank of the Brazos River, crosses the Trinity, and embraces the following named counties and parts of counties: Hill, Limestone, Freestone, Johnson, Ellis, Navarro, Hopkins, Kaufman, Hunt, Dallas, Van Zandt, Henderson, and perhaps some others.

Answer to Interrogatory 5th:

From 1844 to 1848, I do not know anything about the value of lands in the counties named; from 1848 to 1850, I believe any lands in the limits of Mercer's Colony, unimproved, except perhaps some of the bottom lands, could be bought at fifty cents per acre. I believe that there was a great deal of first quality lands in both of the colonial grants, for it is well known that a portion of the lands granted to these colonies are now considered the garden-spot of the State of Texas.

Answer to Interrogatory 6th:

The value of genuine land certificates, from 1848 to 1852, ranged from seven cents to ten cents per acre. I have known forty dollars paid for three hundred and twenty acre certificates. Up to and including the year 1854 certificates rose a little higher, not over twenty

cents per acre. The present value of such certificates range
496 from 22½ to 25 cents per acre. Between the year 1854 and the present time certificates have sold as high as fifty cents per acre. The cause of the fall in prices of certificates is the scarcity of good vacant land to locate. Of course I allude to genuine land certificates that will patent to the assignee.

Answer to Interrogatory 7:

Answered in answer to interrogatory 6th.

Answer to Interrogatory 8th:

The value of lands in Mercer's Colony has steadily risen owing to their geographical position, their attraction to immigration, their nearness to railroads, and that within the limits as defined a great deal of land first quality, adapted to the cultivation of all the cereals as well as cotton, and if there is any vacant land in Mercer's Colony not appropriated to pay public debt, one acre in most cases would be worth five acres of any public lands out west.

P. DE CORDOVA.

Subscribed and sworn to before me this 26th day of November, 1880.

[L. S.] FLAVIUS EVERETT,
Not. Pub. Travis Co., Texas.

497 *Answers to Cross-Interrogatories.*

Answer to Cross-Int. 1st:

I have resided in Texas thirty-two years; in the city of Austin, and engaged in the land agency business.

Answer to Cross-Int. 2nd:

I only know of the boundaries of Mercer's Colony from an examination of Pressler's map made this morning. I had always heard of Mercer's Colony, but not being at all interested in it I never examined where it was.

Answer to Cross-Int. 3rd:

In travelling through the State I have frequently been within the limits of Mercer's Colony, but cannot say how often or the dates.

Answer to Cross-Int. 4th:

What I have stated in regard to the value of lands in Mercer's Colony from 1848 to 1850 is from general information acquired in my business. I cannot state now whether I ever sold a tract of land within those counties between said dates or not, but I know I have often heard of the sale of lands within the limits of said colony during said time at fifty cents per acre.

498 Answer to Cross-Int. 5th:

What I stated in my answers to direct interrogatories in regard to value of land certificates is stated upon my own knowledge, and I feel satisfied that I am correct, and I include the sale of certificates at Galveston, Houston, Austin, and San Antonio. I never heard of certificates being sold on credit; have known sales from single certificates up to five thousand acres.

Answer to Cross-Int. 6th:

I want it distinctly understood that I am not and never was interested in Mercer's Colony, and I am in no way related to any of the parties to this suit, nor do I know since the death of Geo. Hancock who are the parties.

Answer to Cross-Int. 7:

From 1848 until the institution of this suit I was not aware of any obstacle to the location, surveying and procuring of patent to any vacant land within the limits of the country embraced within the lines of Mercer's Colony as designated on Pressler's map of Texas. The lands within those limits were always treated as vacant and unappropriated lands subject to location, and I have received patents from the land office on lands located in said limits. I never heard of any protests of Mercer or any of his representatives until the filing of this suit.

P. DE CORDOVA.

Subscribed and sworn to before me this 26th day of November, 1880.

FLAVIUS EVERETT,
Not. Pub., Travis County, Texas.

499 STATE OF TEXAS, }
County of Travis. }

I, Flavius Everett, a notary public in and for Travis county, State of Texas, duly commissioned and qualified, do hereby certify that the foregoing answers of J. W. Lawrence and P. De Cordova, the witnesses before named, both to the direct and cross-interrogatories, were taken before me, and were sworn to and subscribed before me by the said witnesses.

Given under my hand and official seal at office in city of Austin, Texas, this the 26th day of November, A. D. 1880.

[L. S.] FLAVIUS EVERETT,
Notary Public, Travis County, Texas.

500 And complainant also produced and read upon the hearing the deposition of Joseph Spence, as follows:

Interrogatories to Joseph Spence.

In the Circuit Court of the U. S. for the Fifth Circuit and District of Western Texas, at Austin.

George Hancock, complainant,
No. 98. *v.* } Interrogatories to witnesses for complainant.
J. J. Groos, Land Com'r, &c., defendant.

Interrogatories propounded by the complainant, William Preston, to Joseph Spence, of Travis county, Texas, witnesses in his behalf, and to be by them answered upon oath.

First Interrogatory:

State your name, age, place of residence, and your occupation; also how long you have pursued that occupation.

Second Interrogatory:

501 State whether any patents or certificates for lands within the limits of Mercer Colony, in the State of Texas, or other evidences of title to any such lands, have been issued from the office of the Commissioner of the Land Office of the State of Texas, or from the office of the defendant, W. C. Walsh, since the 1st day of May, 1879. If you have not examined, please now examine and then answer the foregoing question.

If you have not examined, or decline now to examine, state whether it is or is not because defendant is unwilling to have you examine and depose. Have you asked of defendant to permit you to examine and depose? If you have not, please now do so. State what is his reply and answer. Have any surveys been plotted on the maps of the G. L. O. since that date?

Third Interrogatory:

What counties lie within the limits of the Mercer Colony?

Fourth Interrogatory:

Are the lands within the limits of Mercer Colony, as an average, valuable or not valuable in comparison with the rest of the State of Texas?

502 Fifth Interrogatory:

What is the average value of lands within the limits of Mercer's Colony? Give as near an approximation as you can.

Is there any public document of the State of Texas which will furnish this information? If so, name it.

Sixth Interrogatory:

What is the average value of the lands of the State open for general location of land certificates? What do certificates sell for on the market, privileged to be located on the general public domain?

Seventh Interrogatory:

What number of acres of land approximately remain unappropriated within the limits of Mercer Colony? If you cannot answer of your own knowledge, please ask for information on this point at the office of defendant, W. C. Walsh, Land Commissioner of the State of Texas, and of him and his deputy. Give their reply or replies, and state if they furnish the information. State also the value of said vacant land in said colony, and its quality and value as compared with the located or appropriated.

503 Eighth Interrogatory:

State any other matter in this connection that you may know that will throw light on the subject inquired about, or be of benefit to either party to the suit.

HANCOCK, WEST & NORTH,
Sol's for Compl't.

In Circuit Court of U. S., Fifth Circuit, District of Western Texas, at Austin.

No. 98. George Hancock, complainant, *v.* J. J. Groos, Com'r G. L. O., &c., defendant. } In Equity.

The following cross-interrogatories are propounded by the defendant in the above-entitled cause to Joseph Spence, of Travis county, witness for complainant, to wit:

Cross-Interrogatory One:

If, in answer to direct interrogatory second, you state that any patents or certificates for lands within the limits of Mercer's
504 Colony, in the State of Texas, or other evidences of title to any such lands, have been issued from the office of the Commissioner of the General Land Office of the State of Texas, or from the office of W. C. Walsh, the defendant, since the 1st day of May, 1879, then state definitely and particularly in regard thereto. State the date of the issuance of the same, to whom issued, by whom issued, upon what authority issued, for what quantity of land, the exact locality of the land, in whose possession are any such patents, certificates, or titles, and if in your possession, append to your answer to this cross-interrogatory a copy of each, writing your name upon the back of such copy so as to identify it.

Cross-Interrogatory Two:

Do you know the boundaries of Mercer's Colony? Have you ever traced the lines of said colony? If so, when and under what circumstances, and state the locality of said boundary lines, and each of them? Where is the southern boundary line of said colony? Where is Cedar Creek, which is called for in the Mercer Colony con-

tract as being on the southern boundary line? On which side
505 of the Trinity River is said Cedar Creek? Through what counties does said southern boundary line run, and through what portion of said counties? When, where, and how did you obtain your information in regard to the boundary lines of said colony?

Cross-Interrogatory Three:

If, in answer to direct interrogatory second, you say that the defendant Walsh objected to your examining and deposing about the matters mentioned in said interrogatory, then state particularly when and where this occurred, and who was present. What was said by you and what was said by the defendant Walsh in relation thereto, and how and by whom, and for what purpose was the conversation brought about, and did you inform said defendant at the time of your desire to make said examination, and of your object in making it? Did you propose to pay the fees prescribed by law for making or having said examination made? What was the examination you desired to make? What records, papers, files, or maps did you desire to examine? Who asked you to make any such examination? Were you employed by any person to make any such ex-
506 amination; if so, by whom and when? What interest had you or what interest have you now in the matters involved in this suit? Could not the information and facts about which you are interrogated in direct interrogatory second in regard to patents, certificates, evidences of title, and maps be obtained by procuring certified copies thereof from the General Land Office? Did you ever apply for such certified copies; if so, to whom did you apply and when, and what was the result? Please be definite and full in your answer hereto.

Cross-Interrogatory Four:

If, in answer to direct interrogatory second, you state that any surveys have been plotted on the maps of the General Land Office since the first day of May, 1879, upon lands in Mercer's Colony, then state by what means you know the fact, upon what particular map or maps were said surveys plotted, at what particular date or dates were they plotted, by whom were they plotted, for whom and in whose name or names were they plotted, for what quantity or quantities of land; in what county or counties, and give the
507 particular locality of each survey, and state particularly and fully all you know in relation to the plotting of the same and your means of knowing. Are not said maps public archives in the General Land Office of Texas?

Cross-Interrogatory Five:

If, in answer to direct interrogatory third, you state the counties that lie within the limits of Mercer Colony, then state how you know that fact. State the boundaries of said Mercer Colony and your means of knowing said boundaries.

Answer to Cross-Int'y 1:

I know of no patents or certificates for lands issued within the limits of Mercer's Colony, as plotted on the maps, since 1st day of May, 1879, and I don't think any have issued.

Answer to Cross-Int'y 2:

I only knew the boundaries of Mercer's Colony as they are drawn or delineated on the county maps in the General Land Office. I have never traced them and can't speak definitely of the southern boundary. I do not know where Cedar Creek is, nor on which side of the Trinity it is. I have not read the contract with Mercer, and did not know it called for Cedar Creek. My knowledge of the boundary lines is derived solely from the county maps, on which the colony lines are delineated or drawn, and when I refer to the lands in Mercer's Colony I mean those embraced within the lines drawn as the boundaries of Mercer's Colony.

Answer to Cross-Int'y 3:

Com'r Walsh did not object to my examining any of the maps or records relating to Mercer's Colony, but was perfectly
513 willing for me to examine them, and gave me ready access to any map or paper that I wished to examine. No fee was asked or demanded and none tendered. The object in examining the maps and records was to inform myself, so I could answer the direct interrogatories in this suit as above. I have no interest whatever in the matters involved in this suit. Much of the information sought in direct interrogatory 2d could be obtained by certified copies of field-notes and other records in the Land Office. I never applied for such certified copies, nor could I have told what copies would give the information without making an examination of the maps.

Answer to Cross-Int'y 4:

I have not said any surveys were plotted on the maps within Mercer's Colony since the 1st day of May, 1879, though it is possible they may have been. As the date when surveys are plotted on a map is never shown on the map, it is impossible to tell the date when they are plotted except by an examination of the field-notes of each survey. Surveys are made by county surveyors who send the field-notes to the Land Office. The locality of the surveys can't be known until the field-notes are plotted on the maps. Hence, if surveys have been made within the limits of the colony and sent
514 to the Land Office since 1st day of May, 1879, they may possibly have been plotted on the maps. It is in this way the Commissioner and his clerks know the survey or surveys lie within the colony. The maps are public records in the Land Office.

Answer to Cross-Int'y 5:

I stated the names of the counties lying wholly and in part in the colony from an inspection of the maps and from information given

me by the chief draftsman in the Land Office. I can't state the boundaries of the colony more definitely than I have done.

Answer to Cross-Int'y 6:

I have been engaged in the land-agency business, in Texas, since March, 1870. I was Commissioner of the Land Office for something over two years.

Answer to Cross-Int'y 7:

Up to the time of filing this suit, the lands which are now represented to be in Mercer's Colony were located, surveyed, pre-empted and patented regardless of the contract with Mercer. It was understood and considered that the contract was forfeited, and that the limits or boundaries called for were so indefinite that it could not be accurately, or with any certainty, known what territory
515 was actually embraced in the colony, and for years the Land Office, county surveyors, and the people generally acted as if no such contract existed, and the lands were surveyed and patented regardless of it.

JOSEPH SPENCE.

THE STATE OF TEXAS, }
County of Travis. }

I, N. S. Walton, Notary Public in and for the above county and State, do hereby certify that the foregoing answers of Joseph Spence, the witness before named, were made before me, and were sworn to and subscribed before me by said witness, Joseph Spence.

Given under my hand and notarial seal at Austin, Texas, this 6th day of October, A. D. 1880.

[L. S.]

N. S. WALTON,
Notary Public, Travis co., Texas.

516 And complainant also produced and read upon the hearing the deposition of B. J. Chambers, as follows:

U. S. Circuit Court, West. Dist. Texas, Austin. In Chancery.

Geo. Hancock }
No. 98. *v.* }
J. J. Groos. }

Interrogatories to be propounded to B. J. Chambers, of Johnson county, Texas, a witness in behalf of the complainant:

Int'y 1:

Are you acquainted with the parties to this suit, or do you know in general terms its object? If yea, state in a general way what you understand to be the object of the suit.

Int'y 2:

What is your age and present occupation?

Int'y 3:

How long have you resided in Texas, and in what occupation or business have you been engaged most of the time?

Int'y 4:

Where were you residing during the years 1845, 1846, 1847
517 and 1848? Name the places; and if you then held during any of these years any official position, please state what it was.

Int'y 5:

Were you ever acquainted with Gen. Chas. Fenton Mercer, the empresario or contractor with the State for Mercer's Colony? And if so, where and when did you know him?

Int'y 6:

If you say you met him within the limits of Mercer's Colony at any time, please state at what time; and in what part of the colony were you with him? In what year? And what was his and your business there? Please be full and particular.

Int'y 7:

Please state about how many settlers were there then within the limits of Mercer's Colony as well as you are able to answer, and especially in Navarro county, and also in the other counties.

Int'y 8:

Did you ever do any surveying or other work of that kind for Mercer or his associates? And if yea or nay, say what work you were to do, and when and where were you to do it. And if you did not do it, why did you not do it?

518 Int'y 9:

If you say you were prevented or concluded not to survey because of the acts or words of the settlers within the limits of Mercer Colony, please state fully what they did or said to induce you to cease to work, or to decline to work or survey. Please be full, and state all the facts within your knowledge that had influence with you or operated upon your mind to induce you to decline to do the work that Mercer desired done.

Int'y 10:

If there are any facts in your knowledge as to violence or threats of violence uttered or insinuated by the settlers in Mercer's Colony against surveyors and others working in the interests of Mercer, please state all these facts fully and completely.

Int'y 11:

State who, if any one, was acting as an agent for Mercer or his associates in that colony, so far as you know.

Int'y 12:

State any facts in your knowledge as to the establishment of a warehouse or warehouses by Mercer or his associates in Mercer's Colony, on the Trinity River or elsewhere, and state any other facts you may know as to the introduction of colonists by Mercer or his associates in Mercer's Colony.

519 HANCOCK, WEST & NORTH,
Sol's for Compl'ts.

The following cross-interrogatories are propounded by the def'd't, W. C. Walsh, to the witness B. J. Chambers, to wit:

Cross-Int'y 1:

Where did you first settle when you came to Texas? Where did you emigrate from? If you ever resided within the supposed limits of Mercer's Colony, who or what induced you to settle there?

Cross-Int'y 2:

If you undertake in answer to direct int'y 7 to state the number of settlers in Mercer's Colony, then state your means of knowledge. Name as many of those settlers as you can, and state which of them are now living, and where. When did they settle in said colony? Give dates of their settlement as far as you can remember. Where did they emigrate from to Texas, and what had said Mercer or any of his agents or associates to do, as far as you know, with the settlement of these persons in said colony? Who built or had built their
520 houses? Who had their lands surveyed? How and from what place and from whom did they obtain ammunition?

Cross-Int'y 3:

Where did you reside in 1845? Did you assist in surveying any of the pretended boundary lines of Mercer's Colony? If so, when and at whose instance? What line or lines were surveyed, and state fully and particularly all you know about the boundary lines of said colony and the surveying of the same?

Cross-Int'y 4:

If in answer to direct interrogatories you state anything about violence or threatened violence to Mercer or his agents or his surveyors, state when and where this occurred, what persons were present, what was done and said, and by whom, and what resulted. State fully and particularly everything that occurred connected with such violence and threats of violence, and state your means of knowledge.

Cross-Int'y 5:

If you ever surveyed for Mercer, what amount of pay did you receive for your work, and what kind of pay?

Cross-Int'y 6:

Was the Mercer Colony contract ever at any time declared forfeited and at an end? If so, when and in what way was said
521 forfeiture declared? State all you know about it and your means of knowledge.

Cross-Int'y 7:

What interest have you now or what interest did you ever have in the Mercer Colony contract?

WILLSON & GAINES,
PEELER & MAXEY,
Counsel for Def't Walsh.

Geo. Hancock
No. 98. *v.*
J. J. Groos.

Suit pending in the U. S. Circuit Court of Western District of Texas at Austin, Travis county, Texas.

Answers and depositions of B. J. Chambers, of Cleburne, Johnson county, Texas, to the accompanying interrogatories propounded to him in the above-entitled cause, taken before W. J. Rutledge, a notary public in and for Johnson county, Texas, in accordance with accompanying agreement of parties.

Answer to Int'y 1st:

I was personally acquainted with Geo. Hancock many years ago; do not remember to have met him within the past twenty years. I know J. J. Groos by reputation only as late Commissioner
522 of the General Land Office of the State of Texas; do not remember to have ever met him personally. Of my own knowledge I know nothing of the object of the suit; have heard orally or read in newspapers that the object of the suit was to try the validity of certain claims to lands granted by the State of Texas in supposed derogation or conflict with the rights of Charles F. Mercer under his contract of colonization with the State of Texas. Have made no particular inquiry about it, and what I state is supposition, without any real knowledge of the matter.

Answer to Int'y 2:

I was sixty-two years of age last birthday. My present occupation is farming and raising stock in a small way.

Answer to Int'y 3:

I have resided in Texas about forty-three years. My occupation was chiefly that of a deputy surveyor from 1839 for about 10 years; af-

terwards district surveyor for Robertson Land District for two years, and since that chiefly engaged in farming.

Answer to Int'y 4:

During the years 1845, 1846, 1847, and 1848 I was residing in what is now Robertson county, a part of the time at Old
523 Franklin, and a part of the time at Wheelock, if I remember correctly. I was deputy surveyor.

Answer to Int'y 5:

I made the acquaintance of C. F. Mercer some time during the period from 1845 to 1848, if I remember correctly; am not certain as to dates. Cannot state the time with any certainty when I became acquainted with him, but think it was during the period named.

Answer to Int'y 6:

My recollection is that I made his acquaintance in what is now Robertson county. Cannot state the time with any certainty. I made the agreement to sectionize or survey certain lands for him in Navarro and Ellis counties, west of the Trinity River, and at his request accompanied him into the bounds of the grant, as he wished to see it and *and* form some idea as to where the work had best be done. It was in the spring, if I remember correctly. We encountered high waters and saw very little of the country. Went up by way of Springfield, Tehaucana Hills, through the settlement near Dresden to the lower edge of Ellis county on Chambers Creek, and returned on same route, I think.

524 Answer to Int'y 7:

There were at that time several new settlers in the territory, but have no correct or even approximate idea as to the number.

Answer to Int. 8:

I did not do any surveying or any work for Mercer or his associates. I do not remember how much work I was to do under the agreement. Mercer saw but little of it. Was very well pleased with the portion of Navarro and Ellis that he saw, and my recollection is that I was to use my discretion as to the best portion. I did not do it because I was advised by nearly all the settlers that I saw not to do it; that Mercer had not assisted them in their settlement in any way. They seemed opposed to having their lands surveyed under any contract with Mercer.

Answer to Int. 9:

I was not prevented except by the moral influence of the opposition of the settlers. They stated that they had come at their own cost—had no assistance from Mercer—did not propose to have their lands surveyed and give up a part to him.

Answer to Int. 10:

525 No threats of violence was made that I remember. Was persuaded to give up the job. Was advised by one or two settlers that I would not be permitted to survey their lands under any contract with Mercer. Under these influences I never tried to do any work under the contract with Mercer. This is my general recollection of the facts.

Answer to Int. 11:

I never heard at the time of any one acting as agent for Mercer and associates. Do not know that he really ever had any agent in the colony.

Answer to Int. 12:

If any warehouse was ever established by Mercer and his associates in the colony I never heard of it, but my residence was sixty to eighty miles south, and such may have existed without my hearing of it.

Answer to Cross-Int'y 1:

In Houston, Harris county. Emigrated from Kentucky in the spring of 1837. Never resided in the limits of Mercer Colony until 1856; one year near my present residence in Johnson county. Thence to Springfield, and then again in the bounds of the colony near Chatfield Point, Navarro county, in 1859, and from
526 thence to Cleburne in 1865.

Answer to Cross-Int. 2:

I cannot undertake to state the number; there were but few at that time. My memory of names is poor. My acquaintance at that time was limited to a single sight, and don't think I can call to mind any that I then saw who are now living. Cannot give dates of settlement. The Meltons, Howes, Smiths, Mayfield, on lands surveyed before the colony grant—all now dead. Of the settlers on the colony lands at that time were the Andersons, who, I believe, are all dead, and a few other new settlers whose names I do not remember. Do not know where they emigrated from. Do not know where they got their ammunition. Suppose they built their own houses. If any houses were built by Mercer and associates I never heard of it.

Answer to Cross-Int. 3:

I resided in what is now known as Robertson county in 1845. I did not assist in surveying the boundary lines of the colony. Do not think the lines were run until long afterwards. Do not know at whose instance the lines were run. Know nothing actually with the running of the lines.

527 Answer to Int. 4:

I know nothing of any violence or threats of violence to Mercer or any of his surveyors. I was with Mercer in the only visit

he ever made into the colony, and know that we were treated with the utmost courtesy everywhere we stopped—at E. Melton's near Dresden, and at Smith and Howe's on Chambers Creek.

Answer to Cross-Int'y 5:

At the making of the contract Mercer advanced me a small amount of money—don't remember the amount—probably about one hundred dollars, as a fit-out for surveying.

Answer to Cross-Int'y 6:

It was generally understood that the contract was forfeited. Whether formally declared I do not know. The State provided by law for the issuance of certificates to the settlers to be located in the bounds of the colony under the regular State surveyor.

Answer to Cross-Int. 7:

528 I have no interest now, and never did have.

B. J. CHAMBERS.

STATE OF TEXAS, }
County of Johnson. }

I, W. J. Rutledge, a notary public in and for Johnson county, Texas, do hereby certify that the foregoing answers of B. J. Chambers, the witness before named, were made before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and seal of office this 28th day June, A. D. 1880.

[L. S.] W. J. RUTLEDGE,
Notary Public, Johnson Co., Texas.

529 And complainant also produced and read upon the hearing the following receipt, to wit:

AUSTIN, Jan'y 29th, 1853.

Received of Geo. Hancock, Esq., trustee of Mercer's Colony, the sum of two hundred dollars in cash and said Hancock's note for three hundred dollars, due twelve months after date, in payment of a retaining fee for my service in behalf of said colony.

THO. H. DUVAL,
Att'y at Law.

And complainant also produced and read upon the hearing the following note, to wit:

AUSTIN, 29 Jan'y, 1853.

$300. Twelve months after date I promise to pay Thos. H. Duval three hundred dollars for fee in services to be rendered professionally.

GEO. HANCOCK.

530 And complainant also produced and read upon the hearing the following bill of exchange, to wit:

CITY OF GALVESTON, February 16, 1854.

No. ——. Exc. for $800.00.

Seventh day after sight of this original of exchange (duplicate of same tenor and date unpaid), pay to the order of Geo. W. Paschall eight hundred dollars, value received, and charge the same to account of GEO. HANCOCK.

To George Hancock, at
Canal Bank, New Orleans.

Endorsed: Accepted payable at Canal Bank, New Orleans.
GEO. HANCOCK.

Accepted at the date thereof.

Further endorsed: Pay to the order of S. Delgardo.
GEO. W. PASCHALL.
SAM'L DELGARDO.

531 And complainant also produced and read upon the hearing the following paper, to wit:

As to the Mercer Colony.

In 1847 a suit was commenced in behalf of the State under the ordinance to test the validity of the Mercer Colony contract. Mercer was cited by publication, but did not appear. Judgment by default was rendered, declaring the contract void.

In 1853, Geo. Hancock, of Louisville, employed Paschal and Duval to prosecute the claim of Mercer and associates before the legislature. From an examination of all the papers, we thought much expense had been incurred and valuable services rendered. We presented a memorial, and got a favorable report. But the bill for relief was voted down in the house. This was in 1853–4. Last year the claim was re-presented and favorably considered by the committee, but no vote taken in the senate. The parties are certainly entitled to several hundred acres of land, but have no remedy but by appeal to the legislature. To recover such a claim would be attended with much labor and expense. I do not regard the judgment as standing much in the way.

GEO. W. PASCHAL.

1st Dec., 1858.

532 And complainant also produced and read upon the hearing the following letter, to wit:

SUPREME COURT ROOM,
AUSTIN, TEXAS, Dec'r 4th, 1858.

DR. GARNETT:

DEAR SIR: Your last communication, accompanied with the published opinion of the Hon. Caleb Cushing upon the validity and legal

effect of the colony contract of Peters and Mercer with the government of the Republic of Texas, was duly received; and, as I promised you, I now write you the result of my investigations into the matter.

I enclose you a memorandum made for me by Judge G. W. Paschal, who has been the attorney for the colony. He was employed by Geo. Hancock, of Louisville, Ky. You will find that he says a suit was commenced by the State in 1847 against Mercer, for the purpose of testing the ordinance under which the contract was made, and that Mercer was cited by publication and came not, and
533 that judgment was rendered against him by default, declaring the contract void. That several attempts have been made since that time before the legislature for relief for the colonists, but that nothing has been done.

Judge Paschal is a man of prominence here, and considered one of the best lawyers in the State, and what he says about the matter is entitled to full credit. Besides, I find by reference to the journal of the legislature that what he says is correct.

Your only hope is future legislation on the subject. Should there ever be anything done by the Legislature for the colonists, I will inform you, and will take pleasure in assisting you in any way that I can.

Very respectfully, your ob't serv't,

T. M. HARWOOD.

534 And defendant also produced and read upon the hearing the deposition of R. A. Terrell, as follows:

Deposition of R. A. Terrell.

In the Circuit Court of the United States, Fifth District, Western District of Texas, at Austin.

George Hancock, complainant,
No. 98 *v.* } In Equity.
J. J. Groos, Com'r, &c., defendant.

Interrogatories propounded by the defendant William Walsh to R. A. Terrell, witness in defendant's behalf, and to be answered upon oath.

Interrogatory First:

What is your name, age and occupation? Where do you reside?

Interrogatory Second:

Are you acquainted with the section of country in the State of Texas known as the Mercer Colony? If so, when did you first become acquainted with it, and what have been your means and opportunities of knowing said section? Did you ever settle
535 in said section of country? If so, at what date and in what particular portion of the same did you settle, and how long did you reside there?

Interrogatory Third:

In the years 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, and 1847, what was your occupation, if any? And if you were engaged in surveying lands during any of said years, state the time when so engaged, and the section of country in which you were so engaged.

Interogatorry Fourth:

Were you acquainted with a creek or creeks emptying into the Trinity River within or near the supposed boundary lines of said Mercer Colony, called "Cedar"? If so, describe said creek or creeks particularly, the size, the length, locality, source, &c., of the same, and the point or points at which the same empty into said river, and on which side of said river, and when you first became acquainted with said creek or creeks, and what name the same were known by when you first had a knowledge thereof.

Interrogatory Fifth:

Do you know the boundary lines of the said Mercer Colony, or any of them, and which of them, and when and how did you first
536 become acquainted with them, and by whom and when were said boundary lines surveyed and marked, if they ever were surveyed and marked?

Interrogatory Sixth:

Do you know the point at the supposed southern boundary line of said colony crosses the Trinity River? If so, describe this point; its particular locality; what creek or stream empties into the Trinity River at that point, if any, and on which side of said river, and what is the size or length of this creek or stream, and when did you first become acquainted with it, and by what name, if any, was it known when you first became acquainted with it? How far is this point below a large creek called "Cedar" which empties into the Trinity River on the east side of said river?

Interrogatory Seventh:

Were you acquainted with the section of country at and about the place where the southern boundary line of Mercer's Colony is now claimed to cross the Trinity River, prior to 1844? If so, did you know a creek there called "Cedar Creek," and if you did, describe the same.

537 Interrogatory Eighth:

Were you acquainted with Charles Fenton Mercer, or with any of his agents or associates? If yea, which of them did you know? and when and where did you know them? and for what length of time did you know them?

Interrogatory Ninth:

What was the extent of your acquaintance with the settlers within the supposed limits of Mercer's Colony in 1843? What number of

families, to the best of your judgment, were residing within the supposed limits of said colony on the first of January, 1844, and at what particular points were the principal settlements?

Interrogatory Tenth:

Did you have any knowledge of emigrants into said colony limits in 1844, 1845, and 1846? If so, the number of emigrant families that settled within said limits in each of these years respectively, to the best of your judgment; who induced them to settle there, if any one; who built or had built their houses; who supplied them with arms and ammunition; who aided or assisted them in any way to settle in said colony? State fully and particularly all you
538 know about the settling of emigrant families in said limits, and the means and opportunities you had of knowing the facts about which you testify.

Interrogatory Eleventh:

Did you ever know or hear about a suit in the District Court of Navarro county, Texas, instituted by the Governor of the State of Texas against Charles F. Mercer and his associates to declare forfeited the Mercer Colony contract? If so, state when you first knew or heard of said suit, and what you knew or heard about it and about the result of it.

Interrogatory Twelfth:

What, if you know, was the general understanding of the people of that section of country and of the people of Texas in 1848, and subsequent to that date, as to the validity and existence of said Mercer Colony contract, and as to whether or not the terms of said contract had been performed by said Mercer and his associates, and as to whether or not the said contract had been forfeited and ceased to exist by reason of failure on the part of said Mercer and his associates to perform the terms of said contract? State fully all you know in regard the understanding of the public about this,
539 and whether or not this understanding was notorious and general, and whether or not it was recognized and acted upon by the people and officers of said State.

Interrogatory Thirteenth:

In the years 1844, 1845, 1846, & 1847, or in either of those years, did you know of any deposit of ammunition kept at any place for the use of the settlers in said Mercer's Colony by said Mercer or by any one for him? If so, state all you know about it. Where was the ammunition kept; who kept it; what amount and kind was so kept; during what time was it so kept?

Interrogatory Fourteenth:

Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of

your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

WILLSON & GAINES,
PEELER & MAXEY,
Sols. for Defendant.

540 *Cross-Interrogatories to be propounded to R. A. Terrell.*

Cross-Int. 1:

If you say you were surveyor at any time from 1838 to 1847, say if you ever held any county or district office as surveyor; and if so, of what county or district, and when?

Cross-Int. 2.

Were you acquainted with Gen. Chas. F. Mercer or any of his employees or agents from 1840 to 1846? If so, name them, and say what their business was. What were their duties? Where did they stay?

Cross-Int. 3:

Did you ever know or see or hear of a Doctor Daniel Rowlett in connection in any way with Mercer's Colony? If yea, state all you know about his connection therewith.

Cross-Int. 4:

If you ever knew of Mercer or any of his associates or agents introducing any colonists, or running or attempting to run any of the lines of the colony, or of doing any other act whatever in relation thereto, please state fully all about it, giving time and place.

Cross-Int. 5:

If you ever heard of any one having a contract with Mer-
541 cer or his agents as to surveying the colony or doing anything else of that kind, state who it was; and what did he contract to do, and what did he do?

Cross-Int. 6:

Do you know B. J. Chambers, now of Johnson county, and formerly of Limestone county? If yea, state if you ever knew of his doing or agreeing to do anything in the way of surveying, or in any other way as to Mercer's Colony, and when was it and what was it?

Cross-Int. 7:

State any other matter you may know about the matters inquired about.

HANCOCK, WEST & NORTH,
Sol's for Compl't.

Hancock
v.
Groos.

Suit pending in the U. S. Circuit Court, Western District Texas, at Austin.

Answers and depositions of R. A. Terrell, of Kaufman county, Texas, to the accompanying interrogatories, propounded to him in the above entitled cause, taken before William Charlton,
542 notary public of Kaufman county, Texas, commission being waived.

Answers of the witness R. A. Terrell.

To the First Interrogatory he answers:

My name is R. A. Terrell; age 60 years; occupation at present a farmer, and I reside in Kaufman county, Texas.

To the Second Interrogatory he answers:

I am acquainted with a portion of Mercer's Colony east of Trinity River. Visited it first in January, 1840, with a party of surveyors. In 1846 I settled in what is now Kaufman county, (which is in Mercer's Colony,) and have lived in said county ever since.

To the Third Interrogatory he answers:

From 1839 to 1847 my occupation was that of a surveyor and land locator. My district or field of occupation was Kaufman county, a portion of Henderson, Van Zandt, Wood, Hunt, Rockwall, and Dallas counties.

To the Fourth Interrogatory he answers:

In January, 1840, in company with a party of surveyors I crossed a large creek, the channel of which is about 30 varas wide. We called it Cedar Creek, and it has been so called ever since. This creek is made up of several large creeks rising in Kaufman, Van Zandt, and Henderson counties. These creeks have different
543 names, but coming together from what has always been called Cedar Creek. This creek empties into the Trinity River on the east side, and I suppose about 20 or 25 miles above the point where the south line of Mercer's Colony crosses the Trinity River.

To the Fifth Interrogatory he answers:

I think it was in the year 1845 I met with a surveying party running a line in a westerly direction through Henderson county. The surveyor told me he was running the south boundary line of Mercer's Colony. I saw the line frequently afterwards. A short time after this I was surveying in Wood county, and found a plainly marked line, and some settlers told me it was the east boundary line

of Mercer's Colony. I was governed by it afterward in my surveying.

To the Sixth Interrogatory he answers:

I do not know the exact point at which the southern boundary line crosses the Trinity River.

To the Seventh Interrogatory he answers:

See answer to 6th interrogatory.

To the Eighth Interrogatory he answers:

I was not acquainted with Mercer or any of his associates,
544 and but one of his agents, Wm. M. Simpson, who died many years ago.

To the Ninth Interrogatory he answers:

Previous to January, 1844, there were very few settlers in Mercer Colony east of the Trinity River; a small settlement in Dallas county and 6 or 7 families in Kaufman.

To the Tenth Interrogatory he answers:

There were a great many families settled in the limits of Mercer's Colony east of Trinity River during the years 1844, 1845, and 1846. Some of them claimed to be colonists and some were old Texans. I cannot say how many. I knew very little of the settlements west of the Trinity River at that date. I cannot say who induced them to settle in the colony. They all brought their arms and ammunition with them and assisted each other in building houses and otherwise. I never knew or heard of Mercer or any of his associates assisting any of the settlers in any way. I was surveying in the colony during the dates mentioned. Was among the early settlers a good deal and made pre-emption surveys for some of them.

To the Eleventh Interrogatory he answers:

I heard of the Mercer Colony suit in Navarro, but do not
545 recollect any of the particulars.

To the Twelfth Interrogatory he answers:

In 1848, the general understanding was that Mercer and associates had failed to comply with the requirements of their contract and that the same had been forfeited.

To the Thirteenth Interrogatory he answers:

I never knew or heard of any deposit of ammunition being kept by Mercer or any of his associates for the benefit of settlers.

To the Fourteenth Interrogatory he answers:

I do not know of anything further that would be of any advantage to either party in this suit.

Answers to Cross-Interrogatories.

To the First Cross-Interrogatory he answers:

I never held the office of county or district surveyor. I was deputy surveyor in Nacodoches county and afterwards in Nacodoches district.

To the Second Cross-Interrogatory he answers:

I knew one of Mercer's agents, Wm. M. Simpson, dec'd. I don't know what his duties were. He staid mostly at his home, Nacodoches. I met with two or three surveying parties who told me they were sectionizing Mercer's Colony.

To the Third Cross-Interrogatory he answers:

I have heard of Dr. Rowlett in connection with Mercer's Colony, but don't remember anything particular about him.

546 To the Fourth Cross-Interrogatory he answers:

I never knew of Mercer or associates introducing any colonist. As to surveying, I refer to my answer to 5th direct interrogatory as a full reply.

To the Fifth Cross-Interrogatory he answers:

I never knew anything about the contracts between Mercer and his surveyors.

To the Sixth Cross-Interrogatory he answers:

I know B. J. Chambers and heard many years ago something of his connection with Mercer's Colony, but do not recollect any of the particulars.

To the Seventh Cross-Interrogatory he answers:

I don't know anything further that would be of service in this case.

R. A. TERRELL.

STATE OF TEXAS, }
Kaufman County. }

I, Wm. Charlton, a notary public in and for said county, do certify that the foregoing answers of R. A. Terrell, the witness before named, were made before me and were sworn to and subscribed before me by the said witness.

Given under my hand and official seal this the 5th day of June, A. D. 1880.

[L. S.] WM. CHARLTON,
Notary Public, Kaufman Co., Tex.

547 And complainant also produced and read upon the hearing the depositions of H. W. Young and P. P. Martin, as follows:

In the Circuit Court of the U. S., Fifth Circuit, Western District of Texas, at Austin.

George Hancock, complainant,
No. 98. *v.*
J. J. Groos, Com'r, &c., defendant.

Interrogatories propounded by the defendant Wm. Walsh to P. P. Martin, William Reede, and H. W. Young, witnesses in defendant's behalf and to be answered upon oath.

Int'y 1st:

State your name, age, and occupation, and how long you have pursued that occupation. State also your present place of residence and places of former residence, if any.

Int'y 2nd:

At what date did you emigrate to Texas, and where did you emigrate from, and at what particular place did you first settle, and who, if any one, induced you to emigrate to Texas?

548 Int'y 3d:

Do you know the section of country in Texas known as Mercer's Colony? If so, when did you first become acquainted with that section, and how did you come to know it, and what portions of it were you acquainted with?

Int'y 4th:

Did you ever reside within the supposed boundaries of Mercer's Colony? If so, at what place, when did you settle there, and how long did you reside within said supposed boundaries? Who, if any one, induced you to settle there; what induced you to settle there; who had a house built for you, if any one; who supplied you with arms and ammunition, if any one; where did you obtain ammunition from, and how did you obtain it?

Int'y 5th:

Were you acquainted with Charles Fenton Mercer or any of his agents or associates? If so, which of them did you know, when did you know them and where did you know them, and were you induced, aided, or assisted in any way by said Mercer or by any of his agents or associates to settle in said colony? If so, state fully the inducements, aid, or assistance, and all the circumstances connected with your emigration to and settlement in said colony.

Int'y 6th:

549 Did you ever receive any land or land certificate as colonists in said Mercer's Colony? If so, when did you receive the same; what quantity of land did you receive; who did you receive it from; how did you obtain it; where was it located; who

had it surveyed; who paid for surveying it? What, if anything, did Mercer or any of his agents or associates have to do with your obtaining this land?

Int'y 7th:

If you settled in said colony, but never obtained any land or land certificate, state fully the reason why you did not obtain any.

Int'y 8th:

What was the general understanding in the country and in the Mercer Colony section in 1848, and after that time, in regard to the existence and validity of the Mercer Colony contract, and as to whether or not Mercer and his associates had performed the terms of said contract?

Int'y 9th:

Did you ever know or hear anything about a suit in the District Court of Navarro county, brought by the State of Texas against Mercer and his associates, for the purpose of having said colony contract declared forfeited? If yea, state what you know or heard about said suit and the result of the same, and when and how you obtained this information.

Int'y 10th:

550 Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

WILLSON & GAINES,
AND PEELER & MAXEY,
Sols. for Defendant.

Cross-Interrogatories to be propounded to P. P. Martin, William Reede, and H. W. Young:

Cross-Int. 1:

Did you know Dr. Daniel Rowlett? If yea, when did you know him? What connection did he have with Mercer's Colony?

Cross-Int. 2:

What are the general boundaries of Mercer's Colony?

Cross-Int. 3:

What counties are and were within its boundaries?

Cross-Int. 4:

Did you know B. J. Chambers, formerly of Navarro, Limestone, and Freestone counties, and now of Johnson county? If yea, state what you know about his having done surveying within the limits of Mercer's Colony.

551 Cross-Int. 5:

What was the general sentiment of the people in and around that part of the State where Mercer's Colony was located, as to Mercer and his associates? Were they friendly or hostile?

Cross-Int. 6:

What class of the community in that region was unfriendly to Mercer; and why were they so? What were the causes and reasons for this hostility?

Cross-Int. 7:

Did you ever know, or see, or hear of any of Mercer's agents or surveyors being interfered with, or stopped, or obstructed in the discharge of their dutiss, or of their being threatened or ordered away?

HANCOCK, WEST & NORTH,
Sol's for Compl'ts.

George Hancock, complainant,
vs.
J. J. Groos, Comm'r, &c., defendant. } No. 98.

Suit pending in the Circuit Court of the U. S., Fifth Circuit, Western Dist. of Texas, at Austin.

552 Answers and depositions of H. W. Young, of Hill county, Texas, P. P. Martin and William Reede, of McLennan county, Texas, to the accompanying interrogatories propounded to them in the above-entitled cause, taken before H. N. Spooner, Notary Public of Hill county, Texas.

H. W. Young, of Hill county, Texas, being duly sworn, makes the following answers:

Answer to Int'y 1st:

My name is H. W. Young. I am (51) fifty-one years old. I am a farmer. Have been a farmer about thirty years. Present place of residence is Hill county, Texas. My former residence was Ellis county, Texas.

Answer to Int'y 2d:

If my memory serves me right, I came to Texas in 1843, from Illinois. I first settled within the present limits of Ellis county. It was then Robertson county. I was not grown at that time, and came with my father to Texas.

Answer to Int'y 3d:

I am acquainted with most of the section of country that was known as Mercer Colony. Became acquainted with it soon after the

supposed contract was entered into with Mercer, chiefly by hearing Col. James E. Patton (who was a prominent surveyor in this county) and others talk about it.

Answer to Int'y 4th:

I did, at various places; first on Chambers Creek, in Ellis
553 co., in 1843. Ever since that time. My father, as before stated. My father emigrating there with his family. My father. My father. My father supplied me. He purchased his ammunition, provisions, &c., chiefly at the falls of the Brazos River, distant some 80 or 90 miles from where we first settled. Mr. Mercer nor his associates or agents did not furnish my father with anything or give him any assistance whatever.

Answer to Int'y 5th:

I was not. I was not. If my memory serves me right my father settled within the present supposed limits of that colony before the supposed contract was entered into with Mercer granting the colony.

Answer to Int'y 6th:

I did. I cannot recall the date of the event, not having any data at hand to recall the date of the transaction. Received a certificate for 160 acres from Gen'l John M. Crockett, who I understood to be a commissioner appointed by the State under an act for the relief of settlers in Mercer's Colony. I do not know, having sold the certificate before its location. Mercer, his associates, or agents, had nothing to do whatever with my obtaining the said certificate.

Answer to Int'y 8th:

It was universally, so far as my knowledge extended, con-
554 sidered forfeited.

Answer to Int'y 9th:

It was my understanding that there was a suit of that nature instituted there, and the contract was declared forfeited by the court. Cannot recall the date. Obtained my information by hearing others talk in reference to the matter.

Answer to Int'y 10th:

I was pretty generally acquainted with the settlers in the supposed limits of said colony, and, as far as my knowledge extends, I never knew Mr. Mercer, his associates, or agents, to aid any one by furnishing them with rations, ammunition, or having their lands surveyed for them, or otherwise.

H. W. YOUNG.

Answers to Cross-Interrogatories propounded to H. W. Young.

H. W. Young, of Hill county, being duly sworn, makes the following answers:

Answer to Cross-Int'y 1st:

I did not. I do not know what connection he had with said colony, never having heard of him, as far as my memory serves me.

Answer to Cross-Int'y 2d:

I cannot give definitely the boundaries, but it was my understanding that it extended from the south boundary line of Peters's
555 Colony southward, so that the southern boundary line would pass in the vicinity of Brazett, on Trinity River, and the mouth of the Aquilla Creek, a tributary of the Brazos River.

Answer to Cross-Int'y 3d:

I cannot state definitely from memory.

Answer to Cross-Int'y 4th:

Did not know him personally. Knew something of him from reputation. Understood him to be a surveyor.

Answer to Cross-Int'y 5th:

Do not know. As far as my knowledge goes there was no hostility existing.

Answer to Cross-Int'y 6th:

As before stated, I am not aware of any hostility existing.

Answer to Cross-Int'y 7th:

As before stated, I am not aware of any hostility existing between Mercer, his agents, and the people, or of any impediments or obstructions being thrown in their way by ordering them off, or otherwise.

H. W. YOUNG.

556 P. P. Martin, of McLennan county, being duly sworn, makes the following answers:

Answer to Int'y 1st:

My name is P. P. Martin; I am sixty years old; am a farmer about forty years; McLennan county, Cass and Dallas counties, Texas, and Marion county, Tenn.

Answer to Int'y 2d:

In 1846. The State of Tennessee. Dallas county. No one induced me to emigrate to Texas.

Answer to Int'y 3rd:

I do. In 1846, on arriving at Jefferson, Texas, I was informed that there was such a colony, and I came to it. The northern portion at the time referred to, and since all of it.

Answer to Int'y 4th:

I did, in Dallas county, in 1846. About three years in Dallas county, and about twenty-six years in McLennan county; the north-

ern portion of said county. Hedgecoke, who said he was an agent for Mercer's and Peters's colony. He proposed to lift the patent and give me a clear title to 320 acres of land, or rather the half of 320 acres. No one. No one. In Jefferson, Texas; purchased it myself.

Answer to Int'y 5th:

I was. Hedgecoke and three surveyors, whose names I do not now recollect. In 1846, in Dallas county. I was induced to settle in the colony by the offer of the 160 acres of land by said
557 Hedgecoke, but was never aided or assisted in any way by Mercer, or by any of his agents or associates. On arriving in Jefferson I heard there was a colony being organized by Mercer and Peters. I started to it, and in Dallas county found Hedgecoke and three surveyors, who said they were agents for the Mercer and Peters colony. I was introduced to Mr. Mercer by Hedgecoke, but had no conversation with the said Mercer in regard to the colony.

Answer to Int'y 6th:

I did not, but did from the State of Texas; 320-acre certificate. Do not recollect. By proving, at McKinney, in 1858, that I had complied with the requirements of the law that entitled me to 320 acres of land as an actual settler in the fall of 1858. I did. I did. Nothing.

Answer to Int'y 7th:

Because the colony was bursted up, as I was informed, on account of not complying with their contract.

Answer to Int'y 8th:

It was the general impression that there was a valid contract, but that Mercer had failed to comply with the terms of said contract.

Answer to Int'y 9th:

I heard that there was a suit of that nature pending. Do not recollect the date. Obtained my information through general rumor.

558 Answer to Int'y 10:

Nothing more than I have stated above that I can recollect of at present.

P. P. MARTIN.

Answers to cross-interrogatories propounded to P. P. Martin:

P. P. Martin, of McLennan county, after being duly sworn, makes the following answers:

Answer to Cross-Int'y 1st:

I did not know him.

Answer to Cross-Int'y 2d:

My understanding was that it extended from Red River down the divide, between the Brazos and Trinity Rivers, 160 miles.

Answer to Cross-Int'y 3rd:

Dallas, Denton, Grayson, Ellis, Johnson, Hill, Navarro, and part of McLennan counties.

Answer to Cross-Int'y 4th:

I do not know him.

Answer to Cross-Int'y 5th:

They were friendly so far as I knew.

Answer to Cross-Int'y 6th:

No class. No hostility that I knew of.

Answer to Cross-Int'y 7th:

I did not.

P. P. MARTIN.

559 THE STATE OF TEXAS, }
County of Hill. }

I, H. N. Spooner, notary public, of Hill county, State aforesaid, do hereby certify that the foregoing answers of H. W. Young and P. P. Martin, the witnesses before named, were made before me, and were sworn to and subscribed before me by the said witnesses.

Given under my hand and official seal this the 8th day of June, A. D. 1880.

H. N. SPOONER,
Notary Public, of Hill County, Texas.

And defendant also produced and read upon the hearing the deposition of John A. Harlan, as follows:

In the Circuit Court of the United States, Fifth Circuit, Western District of Texas, at Austin.

Wm. Preston, ex'r, &c., of Geo. Hancock, dec'd, complainant,
No. 98. *v.*
Wm. C. Walsh, Com'r, &c., successor to J. J. Groos, Com'r, &c., defendant.
} In Equity.

559½ Interrogatories to be administered to John A. Harlan, B. L. Ham, William J. Stokes, and George H. Cunningham, residents of Ellis county, and material witnesses to be produced, sworn and examined in the above-entitled cause on the part of the defendant.

Interrogatories to all of said witnesses.

Interrogatory First:

What is your age and your occupation, and where do you reside?

Interrogatory Second:

When did you immigrate to Texas, and where did you emigrate from, and in what particular portion of Texas did you settle, and at what particular places in Texas have you resided, and what length of time did you reside at each of said places, respectively?

Interrogatory Third:

Are you acquainted with that portion of Texas commonly known as "Mercer's Colony"? If yea, did you ever reside within the supposed limits of said colony, and when did you reside there, and during what time, and in what particular locality or localities?

Interrogatory Fourth:

If you settled within the supposed limits of said colony, who induced you to settle there, if any one? State all the circumstances of such settlement, the cause of it, and the reasons for settling where you did; and if Charles F. Mercer, or any one connected
560 him in said colony contract, had anything to do with your settlement in said colony, state fully about it.

Interrogatory Fifth:

Who, if any one, immigrated to and settled in Texas in company with yourself? Where did such persons settle, and at what time? Who and what induced such immigration and settlement? Who furnished yourself and other immigrants with arms and ammunition? Who built or had built houses for you? Who had your land surveyed, if you received any land in said colony?

Interrogatory Sixth:

In the years 1845, 1846, and 1847, respectively, what number of male persons over seventeen years of age were settled within the supposed limits of said colony to the best of your judgment, and with what proportion of these settlers were you acquainted, and what were your opportunities for knowing who were settled in said colony, and where were the principal settlements in said colony located?

Interrogatory Seventh:

What was the position of the country embraced within the supposed limits of said colony in the years 1845, 1846, and 1847, with regard to the frontier of Texas? Was said colony on the frontier or a portion of the frontier of Texas at those dates, or was it in the interior of the settled portion of the State? To what danger,
561 if any, from Indians or other enemies of the settlers was the said colony subject during the years named or during either of

those years, and which of them? State fully the condition of the country in these respects during the years named.

Interrogatory Eighth:

What proportion of the males over seventeen years of age that were settlers in said colony in 1845, 1846, and 1847 respectively, within your knowledge, were possessed of fire-arms, and who furnished such arms, or how were they obtained, and who supplied said settlers with ammunition, if they had ammunition, and where was ammunition obtained from by the settlers, and how obtained? Was any ammunition deposited at any place for the supply of said settlers? If so, where was it deposited, by whom was it deposited, and during what time? State fully all facts within your knowledge about the matters inquired of in this interrogatory.

Interrogatory Ninth:

Were you ever acquainted with any of the following-named persons, viz: Robt. Lee, Wm. G. Lee, Jane Warden, Thos. C. Byrd, Daniel Shapard, Rich'd Byrd, Thos. Proctor, Wm. Garrett, Jonathan Wilkins, Orange B. Prentiss, Isaac Wilkins, Mary Wilkins, Geo.
562 Sterrett, Jesse Yarborough, Peter Lee, Wm. Allen Brown, Wiley Jones, Milton D. F. Gerald, John Carter, Mathew R. Wilkins, Silas M. Havins, John Garrett, Thomas Havins, John P. Havins, Wm. McCarrell, Franklin Marrs, David H. Havins, Mark Rushing, Alex. D. Havins, H. Thomas Click, Lewis Marr, Hiram Shelley, King Fisher, Moses Fisher, Joseph M. Stirman, Sterling Shumat, James Hobbs, Wm. Downing, Abraham Watson, Wiley Steel, Wm. Pinethorp, Simon Odell, John Odell, John Odell, Thos. Clevinger, Nehemia Odell, Turner Odell, John Wallace, Eliz. Friend, Eliz. Robinett, Calomus Bukhart, Geo. Bullock, John Dunn, Wm. W. Hobbs, Johnson Shelton, Lemuel Shelton, John Custer, James Garrett, Wm. Stephens, Thos. Speers, Jas. W. Stephens, Joseph Prewett, Drewry B. Koen, Wyatt Parker, Jacob H. Drean, Jesse Henshaw, Daniel J. Gilmore, Wm. K. Newell, Chas. R. Sanders, Jr., Mathew Lancaster, Sterling Lancaster, Robt. P. Lancaster, James Powell, B. B. Dowell, Geo. Reevis, Peter High, John W. Shirley, Thos. Denton, Henry Hunter, Geo. B. Denton, Alfred Carlyle, John Harden, David Carlyle, Henry Ratts, Wilson Fogeman, David Rogers, Andrew H. Henry, Jesse Zino, John Y. Buk, Thos. J. White, Larkin Cupps, Nath'l Daugherty, Reuben Deweye, Wm. Paddix, Wm. Daugherty, H. M. Daugherty, N. Daugherty, Jacob Deweye, Leonard Eastwood, James M. Maner, John Damron, John J. Damron, Thacker Vivian, James Vivian, Thomas Vivian, Victor Pernell, Elisha
563 Browning, John Pennington, Levi Pennington, Brown C. Roberts? If so, state which of them you knew, when you knew them, and where they resided when you knew them? Of what colony, if any, were they settlers? Are they living or dead? If living, where do they now reside?

Interrogatory Tenth:

Did you ever receive any land or any certificates for land as a settler in said Mercer's Colony? If so, when did you receive it? From whom and under what authority did you receive it? How much did you receive? Where was the land located? At whose expense was it located and surveyed? State all the facts fully in regard to the matters inquired of in this interrogatory.

Interrogatory Eleventh:

Were you acquainted with Charles Fenton Mercer? If so, when did you know him and where did you know him?

Interrogatory Twelfth:

Were you acquainted with an association called the "Texas Association," composed of Charles Fenton Mercer and others? If so, when did you know said association and state all you know in regard to the same—its objects and purposes, its acts and operations, and the persons who composed it and its agents, if you knew any of them.

Interrogatory Thirteenth:

564 Did you ever have any connection with said Charles Fenton Mercer or with said "Texas Association," or with the agents of either, in regard to your immigration to and settlement in said Mercer Colony? If so, state fully and particularly, giving dates, such connection.

Interrogatory Fourteenth:

What, if anything, did Charles Fenton Mercer or said "Texas Association," or any agent of either, have to do with your immigration to and settlement in said Mercer Colony, or with the immigration to and settlement in said colony of any other person within your knowledge?

Interrogatory Fifteenth:

Are you acquainted with any portion of the Trinity River? If so, state with what portion of said river you are acquainted—when you became acquainted with it—and what has been your opportunities for knowing the same.

Interrogatory Sixteenth:

Do you know any creeks called "Cedar" emptying into said Trinity River below where the city of Dallas now stands? If so, describe said creeks. Where are they located—what is their length and size—at what points do they empty into said river, and on which side of said river are they found, and when did you first know said creeks, and what were they called when you first knew them?

Interrogatory Seventeenth:

565 Are you acquainted with the stream at the mouth of which it is claimed by some the supposed southern boundary line of the Mercer Colony crosses the Trinity River? If so, state

when you first became acquainted with said stream; by what name, if any, was it then known; into what stream, if any, does it empty; what is its length an size; and state fully all you know in relation to it, and your means and opportunities for knowing the facts to which you testify.

Interrogatory Eighteenth:

Do you know any of the boundary lines of said Mercer Colony? If so, which of them do you know, when did you first know the same, and how did you obtain your knowledge of them? Did you see the lines surveyed, or do you know they were surveyed? If so, when were they surveyed and by whom? State every fact you may know about the surveying and marking of the boundary lines of said colony, if they were surveyed and marked.

Interrogatory Twentieth:

Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

WILLSON & GAINES,
PEELER & MAXEY,
Counsel for Defendant.

566 Cross-interrogatories to be propounded to the above-named witnesses:

Cross-Int. 1:

Do you know of any surveyor or any one else ever attempting at any time to run the lines of Mercer's Colony? Please state all about it.

Cross-Int. 2:

Did you know a surveyor by the name of B. J. Chambers who ever had anything to do with surveying in that colony? Please state all about it.

Cross-Int. 3:

Was there not a considerable hostility manifested towards Mercer's Colony in 1844, 1845, 1846, and 1847? State all about it. If you know enough to answer the interrogatories-in-chief, do you not know about this hostility to Mercer's Colony? If not, how does it happen that you do not know about it?

Cross-Int. 4:

Did you know Dr. Rowlett of Fannin county? Did you ever hear of him? If yea, state all you know about his connection with Mercer's Colony.

Cross-Int. 5:

State when each of you came to Texas; in what year. State all you may know as to any effort on the part of General Charles F. Mercer or of his agents or associates to settle immigrants
567 within the limits of Mercer's Colony. Be full and particular.

Cross-Int'y 6:

Have either or all of you or any of you given sworn statements or affidavits to any one as to your knowledge of matters in connection with Mercer's Colony and its settlement? If yea, when did you give such sworn statement, and to whom did you give it; and why did you give it; and before what officer was it given; and who induced you to give it; and what reasons did he give to induce you to give it?

Cross-Int. 7:

Has any person conversed with you as to the facts of this case? If yea, who was it, and where does he live, and how came it about that he approached you on this subject?

Cross-Int. 8th:

Do you know of any one ever acting as commissioner for Mercer's Colony? If yea, who was it, and is he dead or alive, and, if alive, where does he live?

HANCOCK, WEST & NORTH,
Sols. for Compl'ts.

568 In Circuit Court of the United States, Fifth Circuit, Western District of Texas, at Austin.

Wm. Preston, ex'r, &c., of Geo. Hancock, dec'd, complainant, *vs.* Wm. C. Walsh, Com'r, &c., successor of J. J. Groos, Com'r, &c., defendant.	No. 98. In Equity.

Answers and depositions of J. A. Harlan, residence in Ennis, Ellis county, Texas, to the accompanying interrogatories propounded to him in the above-entitled cause, taken before T. B. Chalmers, a justice of the peace and ex-officio notary public in and for Ellis county, in accordance with an agreement between attorneys.

Answer to Interrogatory 1st:

Aged 56. Reside in Ennis, Ellis co., Texas. Trader.

Answer to Interrogatory 2.

Came to Texas in fall 1846. Came from Illinois. Settled in Navarro co., Texas, at Corsicana. Have resided ever since in Navarro and Ellis counties, Tex. Lived in Navarro county 21 years; in Ellis 12 years.

Answer to Interrogatory 3:

I am acquainted with a portion of it. I have resided in supposed limits ever since 1846. Have been in Ellis and Navarro counties, both supposed to be in limits of colony.

569 Answer to Interrogatory 4:

Don't know that any one induced me to settle in colony. Chas. F. Mercer nor any one else never did have anything to do with my settlement in colony.

Answer to Interrogatory 5:

A good many immigrated with me. Hampton McKinney, Jefferson McKinney, F. R. Kendall, J. S. McKinney; these were heads of families and settled with me in Navarro co., 1846. We came and settled with our own accord. We furnished ourselves arms and ammunition when we had any. We built our own houses. I sold my certificate. Kendall sold his. Hampton McKinney had his located in Johnson co. Paid Dave Fearris 37½ dollars to locate it for him. I got the certificate, a 640, which I sold as above. Issued by Crockett, John M.

Answer to Interrogatory 6:

I count up in my mind now 20 male persons over 17 who settled in supposed limits of colony. These were married ones, and a good many heads of families besides. I was acquainted with all of them. These I knew in '46 and '47. I knew them because I lived among them and visited back and forth. Principal settlements were located near Dresden, Navarro county, Springhill, Richland Creek, Chambers Creek, and on Trinity River, near Chatfield.

Answer to Interrogatory 7:

If I remember correctly, the Legislature of '46 established a frontier line. That line left a little of colony in frontier. I do
570 not consider we were in danger of hostile Indians in '46 or '47. They came in and stole our stock occasionally.

Answer to Interrogatory 8:

About one-half of us had guns, (no pistols,) which we bought and brought with us here. We bought our own ammunition. We bought at Dresden what we did not bring with us, (ammunition.) No ammunition ever was deposited anywhere for us that I ever heard of.

Answer to Interrogatory 9:

I knew Wiley Jones, Charles R. Saunders, Sr., Charles R. Saunders, Jr., Alphred Carlyle, Nath'l Daugherty. I knew these in '47 and '48. Wiley Jones lived in Navarro county. The rest lived in Kaufman and Henderson counties. They were settlers of Mercer's Colony. All dead, I think.

Answer to Interrogatory 10:

I received a 640-acre land certificate, Mercer's Colony. John M. Crockett issued it. Think it was in '50 or '51. Certificate was laid in Kaufman county, (I've been told.) I sold certificate to Col. Elliott.
Don't know who paid expense of location. Think he located
571 himself.

Answer to Interrogatory 11:

I was not acquainted with Chas. F. Mercer.

Answer to Interrogatory 12:

I was not acquainted with association called "Texas Association." Don't know anything at all about any of them or it.

Answer to Interrogatory 13:

Never did in the least have any connection with Mercer or his agent in any way with regard to my immigration.

Answer to Interrogatory 14:

They had nothing to do with me or any of us in any way.

Answer to Interrogatory 15:

Am acquainted now with a good deal of Trinity River. At that time, in 1846 or 1847 and 1848, I knew most creeks or crossings to Dallas on Trinity River.

Answer to Interrogatory 16:

I know one creek emptying into Trinity 3 or 4 miles below Dallas, called Cedar Creek. It's a small creek or branch, 8 or 10 miles long, empties into Trinity about 4 miles below Dallas, on west side river. First time I crossed said creek was in 1848. Was called Cedar Creek then.

Answer to Interrogatory 17:

There are two creeks there, one called Caney and one called Tehencana, (Tewaukeny.) Some claimed the southern line of Mercer Colony crossed at or near the mouth of one, and some
572 the other, above Pine Bluff, on w. side Trinity River. I first became acquainted with said streams in 1849. Crossed both on a trail. Known then by same names, (above.) Both empty into Trinity River. They are each about 25 or 30 miles long.

Answer to Interrogatory 18:

Do not of my own knowledge know any of the boundary lines of Mercer's Colony. Do not know they ever were surveyed or not.

Answer to Interrogatory 20:

Don't know that I could.

Answers to Cross-Interrogatories.

Answer to Cross-Int'y 1:

No, sir; I do not.

Answer to Cross-Int'y 2:

I do know B. J. Chambers, but do not know anything about his ever surveying for Mercer's Colony.

Answer to Cross-Int'y 3:

There was some in 1847. I knew but little about people in 1846, as I had just landed in here in Dec'r, 1846, and nothing in 1845.

Answer to Cross-Int'y 4:

I did not know Dr. Rowlett. Never heard of him.

Answer to Cross-Int'y 5:

We came in 1846. I never knew of any effort of Charles F. Mercer to settle emigrants in colony.

Answer to Cross-Int'y 6:

573 I have. I don't recollect; inside of two and less years, I think. I gave it because I was asked for it. Given before T. B. Chalmers, a J. P. I forget the attorney's name at whose request I gave it. He lived at Palestine. I don't remember any reason he gave; told me that Col. Winkler had given him my name as one likely to know, being an old settler, and that he had got Col. Riggs's statement and wanted mine.

Answer to Cross-Int'y 7:

No one has conversed with me as to facts of this case.

Answer to Cross-Int'y 8:

J. M. Crockett issued the certificates. Whether he was commissioner or not I don't know, only as I heard.

J. A. HARLAN.

STATE OF TEXAS, }
Ellis county. }

I, T. B. Chalmers, a justice of the peace and ex-officio notary public in and for Ellis county, do hereby certify that the foregoing answers of J. A. Harlan, the witness before named, were made before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and official seal this 12th day of July, A. D. 1880.

T. B. CHALMERS,
J. P. & Ex. O. N. P., E. C., T.

[L. S.]

And defendant also produced and read upon the hearing
574 the deposition of John M. Crockett, as follows:

In Circuit Court of U. S., Western District of Texas, at Austin.

George Hancock, compl't,
No. 98. *v.* } In Equity.
J. J. Groos, def't.

Interrogatories propounded by the defendant, William Walsh, to John M. Crockett, witness in defendant's behalf, and to be answered upon oath:

Int'y First:

What is your name, age, and occupation, and where do you reside?

Int'y Second:

When did you come to Texas, and in what portion of Texas did you settle, and where have you resided since you came to Texas?

Int'y Third:

Are you acquainted with the section of country known as Mercer's Colony? If so, when did you first become acquainted with it, what is the extent of that acquaintance, and what have been your
575 opportunities of knowing it and of knowing the settlers therein?

Int'y Fourth:

What official position, if any, did you hold in 1850 and 1851? If you state that you were commissioner to issue land certificates to settlers in Mercer's Colony, state who appointed you, when you entered upon the duties of that position, what those duties were, and when they ceased.

Int'y Fifth:

If you acted as commissioner aforesaid, state fully and particularly your acts and proceedings. What places in said colony did you visit; what was the purpose of those visits; what notice did you give of these visits, if any; and what was done by you as such commissioner at these visits?

Int'y Sixth:

Did you make any written report of your action and proceedings as such commissioner? If so, to whom did you make said report, and when; and did you make more than one such report, and if so, how many did you make, and to whom were they made, and
576 state the date of each?

Int'y Seventh:

To what persons, if any besides those named in your report of

date 11th day of December, 1851, did you as commissioner aforesaid issue land certificates?

Int'y Eighth:

Examine the following list of names, viz.: Robert Lee, Wm. G. Lee, James Warden, Thomas C. Byrd, Daniel Shapard, Richard Byrd, Thomas Proctor, William Garrett, Jonathan Wilkins, Orange B. Prentiss, Isaac Wilkins, Mary Wilkins, George Sterrett, Jessee Yarborough, Peter Lee, Wm. Allen Brown, Wiley Jones, Milton D. F. Gerald, John Carter, Mathew R. Wilkins, Silas M. Havins, John Garrett, Thomas Havins, John P. Harris, William McCarrell, Franklin Marrs, David H. Harris, Mark Rushing, Alexander D. Havins, H. Thomas Click, Lewis Marr, Hiram Shelley, King Fisher, Moses Fisher, Joseph M. Stermans, Sterling Shumat, James Hobbs, William Downing, Abraham Watson, Wiley Steele, William Pinethorp, Simon Odell, John Odell, John Odell, Thomas Clevinger, Nehemiah Odell, Turner Odell, John Wallace, Elizabeth Friend, Elizabeth Robinett, Calomus Buckhart, George Bullock, John Dunn, Wm. W. Hobbs, Johnston Shelton, Lemuel Shelton, John
577 Custer, James Garrett, William Stephens, Thomas Speers, James Stephens, Joseph Prewitt, Drewry B. Koen, Wyatt Parker, Jacob H. Drean, Jessee Henshaw, Daniel J. Gilmore, Wm. K. Newell, Charles R. Sanders, jr., Mathew Lancaster, Sterling Lancaster, Robert P. Lancaster, James Powell, B. B. Dowell, George Reeves, Peter High, John W. Shirley, Thomas Denton, Henry Hunter, George B. Denton, Alfred Carlyle, John M. Denton, James Noble, A. C. Ransom, John Hardin, David Carlyle, Henry Ratts, Wilson Fogerman, David Rogers, Andrew H. Henry, Jessee Zinc, John T. Beck, Thomas J. White, Larkin Cupps, Nathaniel Daugherty, Reuben Deweye, William Paddix, William Daugherty, N. Daugherty, Jacob Deweye, Leonard Eastwood, Alexander Eastwood, Wm. T. White, John Eastwood, James M. Maun, John Damron, John J. Damron, Thacker Vivian, James Vivian, Thomas Vivian, Victor Purnell, Elisha Browning, John Pennington, Levi Pennington, Brown C. Roberts. Which of the foregoing named persons, if any of them, were you acquainted with? Name them. When did you first become acquainted with them? Where did they reside when you first knew them? Did you ever know them to reside within the supposed limits of Mercer's Colony? and if so, when, and at what place? Which of said persons, if any of them, applied to you as commissioner for land certificates as settlers
578 in said colony? Name them. Which of said persons named in said list, if any of them, are now living? Name them; and state their residence, if you can.

Int'y Ninth:

If any of persons named in the preceding interrogatory were settlers in Mercer's Colony, state, if you know, the dates when they became such settlers, and by whom they were introduced and settled in said colony, if by any one.

Int'y Tenth:

If any of said persons resided outside the limits of said colony when you knew them, name such persons, and state where they reside, and for what length of time, if you know, they had so resided.

Int'y Eleventh:

Did any of the persons named in interrogatory 8th reside within the supposed limits of said colony prior to the 29th day of January, 1844? If so, name them; and state your means of knowledge; and are they now living or dead; and if living, state their residence.

579 Int'y Twelfth:

Did any of the persons named in said interrogatory own lands in said colony prior to 1844? If so, name such persons, and state how they obtained or acquired their lands, and whether or not such persons ever obtained, applied for, or claimed land as settlers in Mercer's Colony?

Int'y Thirteenth:

What portion of said colony did you visit or travel over while you were commissioner? Where were the principal settlements in said colony? What were your opportunities for knowing the settlers in said colony? What proportion of the male inhabitants of said colony were you acquainted with in 1850?

Int'y Fourteenth:

In 1850, what was the general understanding in the Mercer Colony section in regard to the validity of the Mercer Colony contract, and as to whether or not it had been forfeited by Mercer and his associates, and, if forfeited, how forfeited, and as to whether or not Mercer and his associates had complied with and performed the terms of said contract, and if they had failed to do so, in what respect had they so failed?

580 Int'y Fifteenth:

In 1850, and since that time, how have the people of Texas and the government of Texas regarded and treated said Mercer Colony contract? In what manner has it been recognized by the people and officers of the State since that date, and what has been their action in reference to it?

Int'y Sixteenth:

Were you acquainted with P. J. Pillans, Thomas C. Bean, John Miller, or James Hillhouse, or with either of them? If so, which of them did you know, and when and where, and where did they reside, and where do they now reside, if living?

Int'y Seventeenth:

What did Charles Fenton Mercer or any of his agents or associates do, as far as you know, in about the introduction and settling of

the persons who resided within the supposed limits of said colony? Which of the settlers, if any, were introduced and settled in said colony by said Mercer or his agents, or by his associates? Who introduced and settled the residents of said colony as far as you ever knew? Who furnished them with houses? Who supplied them with arms and ammunition? Who had their lands surveyed? What information have you in regard to these matters, and from
581 what source did you obtain this information?

Int'y Eighteenth:

Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If yea, set forth the same fully and at length in your answer.

WILLSON & GAINES,
AND PEELER & MAXEY,
Sol's for Defendant.

In the Circuit Court of the U. S. for the Western District of Texas, at Austin.

George Hancock, complainant,
No. 98. *vs.* } In Equity.
J. J. Groos, Land Commissioner, &c., defendant.

Cross-interrogatories propounded by the complainant, William Preston, to John M. Crockett, witness for the defendant, W. C. Walsh, and to be answered on oath:

582 First Cross-Interrogatory:

If, in answer to direct interrogatory No. 4, you state that you held any official position, or acted as commissioner, state explicitly whether you did not hold your appointment and act under the law of the State of Texas, passed 2nd February, 1850, printed in Hartley's Digest of the Laws of Texas, pages 702, 703, and 704.

Second Cross-Interrogatory:

If, in answer to the direct interrogatories propounded by defendant, you have stated that you had any knowledge of Mercer's Colony, state now what was the average value per acre or per section of 640 acres of land within it in the year 1850. State further what is the present average value of such lands.

Third Cross-Interrogatory:

What is the present market value of certificates for lands issued from the General Land Office of Texas, and open to location on any part of the unappropriated public domain of the *of the* State?

Fourth Cross-Interrogatory:

State what sum or amount of money you received as your pay or

fees as commissioner under the law of 2nd Feb'y, 1850, be-
583 fore referred to. Give the sum total.

Fifth Cross-Interrogatory:

Have you read the answer or amended answer of defendant in this case? If so, state when, where, and under what circumstances and by whom was a copy furnished you. Were you or not consulted before its preparation?

Sixth Cross-Interrogatory:

Have you or not been consulted, talked with, or written to by the defendant or defendants, attorneys or agents, or some of them, or some other person, as to the preparation or substance of your answers to the interrogatories or some one or more of them?

Has not a copy of the direct interrogatories been furnished you prior to your depositions being taken?

If you answer yea to either of these facts, please give the facts, dates, and names of persons.

Seventh Cross-Interrogatory:

Have you or not interested yourself in the preparation of testimony for defendant in this case?

Have you not corresponded or conversed heretofore with the defendant or his agents or attorneys, or some other persons, in
584 reference to such testimony? Have you not furnished or suggested names of witnesses to be examined in defendant's behalf?

Have you not advised with defendant or his agents or counsel, or other persons taking interest in the cause, as to the points of such examinations of defendant's witnesses?

If you answer yea to these inquiries or any of them, please give times, places, names of persons, and file letters, if any, connected with the same.

Eighth Cross-Interrogatory:

Have you received, or been promised, or led to expect any compensation, remuneration, or reimbursement of any kind or in any amount, for any labor, information, suggestion, correspondence, inquiry, report, trouble, or other thing or matter whatever by you done, given, made, conducted, instituted, reported, or in any wise by you undertaken?

If so, state fully and particularly and without reserve all the facts, giving complete details, with the names of persons, times of such transactions, and other things connected therewith.

Ninth Cross-Interrogatory:

Have the direct interrogatories propounded to you by the de-
585 fendant been read to you by the officer taking your deposition, one by one, and singly, and in their proper order and sequence, and your answer to each reduced to writing before his

reading to you, or your reading or hearing, any of the succeeding interrogatories?

Or have you read, or heard read, or seen a copy of such interrogatories, or any of them, before testifying herein?

Have you been apprised of the substance of any one or more of said interrogatories before giving your deposition herein and before the interrogatories being read to you by the officer taking this deposition?

If you answer either of these inquiries "yea," then state how, when, and by whom and for what reason you had such knowledge, information, or advice.

Tenth Cross-Interrogatory:

Who has been present during the taking of your deposition, or at any time during its taking?

WM. PRESTON,
JOHN MASON BROWN,
HANCOCK, WEST & NORTH,
Solicitors for Compl't.

586 George Hancock, complainant,
No. 98. *vs.*
J. J. Groos, defendant.

Suit pending in the U. S. Circuit Court, Western Dist. of Texas, at Austin.

Answers and depositions of John M. Crockett, a resident of Dallas county, Texas, to the accompanying interrogatories propounded to him in the above-entitled cause, taken before Charles Fred'k Tucker, a notary public within and for Dallas county, Texas:

To the 1st Interrogatory the witness says:

My name is John M. Crockett; age, sixty-three years; my occupation, farmer; residence, Dallas county, Texas.

To 2d Interrogatory:

I came to Texas in the fall of 1847. I remained in Paris, Texas, during the winter of 1847–8, and removed to Dallas, Dallas county, Texas, in the spring of 1848, and have resided in Dallas county continuously since that time.

To the 3d Int'y:

I am acquainted with the section of country known as Mercer's Colony. I became acquainted with it in 1849; had known something of it before then. My acquaintance was extensive and
587 intimate. I was appointed the commissioner for the colony under appointment of the Governor of Texas in 1850, under a statute of the State of Texas, and my official duties made it neces-

sary for me to travel all over the colony and to become acquainted with all the colonists.

To 4th Int'y:

As stated before, I was in 1850 appointed by Governor P. H. Bell of Texas, and confirmed by the Senate, as commissioner to issue land certificates to settlers in Mercer's Colony. I entered upon the performance of the duties of the office in the spring of 1850, and my duties ceased in 1851; in the fall, I believe. My duties were to visit the colony and the settlers therein to ascertain who were entitled to land certificates under the statutes, and to issue certificates to such settlers as were entitled thereto. The act under which I was appointed and acted was an act to quiet the titles to land of settlers in the territory known as Mercer's Colony.

To 5th Int'y:

I visited Kaufman, Buffalo, Greenville, Black Jack Grove, Leonard's Station, Canton, Prairieville, Collins' Mound, Haught's Store, Dameron Station, Porter's Bluff, Corsicana, and also many private houses, where I met settlers and issued certificates. The purpose of this visit was to ascertain who were entitled to land under the statute, and to issue certificates to those entitled. I visited all the
588 above-mentioned places twice, in 1850 and 1851. I sent out handbills and had them posted throughout the colony, notifying the settlers at what time I would visit the respective places in the colony, and calling on them to appear at such places and make proofs before me of their rights to have certificates issued to them. I examined into the proofs as required by the statute, and thereupon issued certificates to such as made the proofs required by the statute.

To 6th Int'y:

I made a report in writing of my action and proceedings, as such commissioner, to the Commissioner of the General Land Office of the State. I do not remember the exact date of said report, but my recollection is that it was made in the winter of 1851–'2. I made but one report.

To 7th Int'y:

I issued certificates to none others than those named in my said report.

To 8th Int'y:

I have examined the list. I was acquainted with some persons by the name of Lee, settlers in Mercer's Colony, but cannot now remember the initials, and cannot state whether they were the ones mentioned in the list. The first name on the list that I recognize as
589 that of a person with whom I was acquainted is that of Wiley Jones. He lived in the north end of Kaufman (now Rockwall) county. I first knew him in 1849. He lived within the supposed limits of Mercer's Colony. I think he got a certificate, but I

do not remember whether he did or whether he applied to me for one. John Carter is the next one on the list that I remember. He lived in Kaufman county, south of the town of Kaufman. I knew him first in 1850. I think he had an old headright certificate, and that I did not issue a certificate to him. The next name on the list that I recognize is that of H. Thomas Click, who lived in Lamar county, not within Mercer's Colony. I issued no certificate to him. I knew several Odells in Mercer's Colony, but can't remember their given names, and I am satisfied that I issued certificates to some of them, but cannot say to which ones. I knew the Odells in 1850. I think they lived in Navarro county. I remember that I knew men by the name of Noble, John Hardin, and Henry Ratts, and John Y. Beck, Nathaniel Daugherty, John Dameron and John J. Dameron, Thacker Vivian, Victor Pannell, Levi Pennington. These are all on the list that I can now remember certainly, though it is probable that I knew more of them. I knew the above named persons in 1849 and 1850, and I think I issued certificates to all named in this answer except John Dameron, John J. Dameron, Thacker
590 Vivian, and Levi Pennington. Noble and John Hardin lived in Kaufman county. Beck lived in northwest portion of Kaufman county. Daugherty lived in east portion of Kaufman county. The Damerons lived in S. E. portion of Kaufman county. Victor Pannell lived on the Trinity, in Kaufman county. Levi Pennington lived in Kaufman county. Levi Pennington is living at Georgetown, Williamson county. I do not know which of the others now living. Without having my said report before me to refresh my memory it is impossible for me more fully answer this interrogatory.

To Ninth Int'y:

It is impossible for me to answer this interrogatory without having my said report at hand by which to refresh my memory.

To 10th Int'y:

To this interrogatory I must make the same answer as to the 9th int'y.

To 11th Int'y:

I know nothing of their residence so far back as 1844, and am unable to more definitely answer this interrogatory.

To 12th Int'y:

I do not know.

To 13th Int'y:

I visited every settlement in the colony. The principal settlements I have hereinbefore named. My opportunities were those derived from my official relations above stated.

591 To 14th Int'y:

The general opinion amongst the settlers in the Mercer's Colony section was that there was no validity in the claims of Mercer's colonists as such, and the settlers did not base their claims to lands on the Mercer's Colony contract, believing that Mercer had forfeited his claims under the contract. That was the opinion, without exception, as I now recollect. They did not believe that Mercer had complied with his contract. They thought he had failed in not surveying the lands, or in performing any other act stipulated in his contract.

To 15th Int'y:

It has not been recognized at all.

To 16th Int'y:

I knew them slightly—more from reputation than personally. They resided in Fannin county, near Bonham. I knew them in 1849 & 1850. I do not know whether they are now living or not.

To 17th Int'y:

It was the common repute in the colony in 1849 and 1850 that Mercer and his associates had done nothing in the settlement of the country, in the surveying of the lands, furnishing houses, ammunition, &c.; but it was then understood that the settlers had located there without the aid of Mercer and his associates, and that
592 they had no connection or relation with Mercer and his associates. The settlers had their own land surveyed. During all my visit I never heard a settler in Mercer's Colony claim that he was introduced or brought into the country by Mercer or his *or his* associates, or to base his claim to lands under the Mercer Colony contract.

To the cross-interrogatories the witness answers as follows:

To First Cross-Int'y:

I was appointed under an act of the legislature of Texas entitled "An act for the relief of the citizens of Mercer Colony" of Feb'y 2nd, 1850, which took effect March 21st, 1850. I have not Hartley's Digest accessible at this time, and do not know the page in said Digest in which it is printed.

To 2nd Cross-Int'y:

The average value of lands in Mercer's Colony in 1850, according to my recollection, was from 25 c'ts to 50 c'ts per acre. The present average value of such lands, I would say, is about five dollars per acre.

To Third Cross-Int'y:

I do not know the present value of land certificates.

To Fourth Cross-Int'y:

My fees, according to the best of my recollection, amounted to about twenty-four hundred dollars in the aggregate. I cannot be more definite. I received two dollars for each certificate issued, and I think I issued about twelve hundred certificates.

593 To 5th Cross-Interrogatory:

I read the answer of Land Commissioner Groos and also that of Commissioner Walsh in this case. I was not consulted before the preparation of the answers, or either of them, to the best of my recollection. I was consulted by Judge Wilson about the evidence in this case, but I think it was after the answer had been filed.

To 6th Cross-Int'y:

In answer to this interrogatory, I will say that last winter I had a conversation with Judge Wilson, one of defendant's counsel, in which he interrogated me as to what I knew about Mercer's Colony, and in that conversation I stated to him substantially what I testified herein. No copy of interrogatories has been furnished. I have never seen the interrogatories, nor a copy of them, nor of any part of them, until the notary called me to his office to-day and began the present examination.

To 7th Cross-Int'y:

I have not interested myself in the preparation of testimony in this case. I have conversed with Judge Wilson with regard to the facts of the case within my knowledge, as stated in foregoing answers, but with no other person at no other time, nor otherwise than as previously stated. I suggested to Judge Wilson the names of certain persons who would be able, as I thought, to furnish evidence pertinent to the case. I have advised with no one as to points of
594 examination of defendant's witnesses. My conversation with Judge Wilson, above referred to, occurred in Dallas some time last winter. The exact time I am unable to state.

To 8th Cross-Int'y:

I have not, in any respect whatsoever.

To 9th Cross-Int'y:

They have not. The interrogatories have been read to me by the notary taking my depositions one by one in the order in which they occurred, and my answers to each committed to writing herein by said officer before the succeeding interrogatories were read to me, and I did not myself read such interrogatories or a copy of them.

To 10th Int'y:

No person has been present during the taking of these depositions save the notary taking the same and myself.

JNO. M. CROCKETT.

THE STATE OF TEXAS, }
County of Dallas. }

I, Charles Fred'c Tucker, a notary public within and for Dallas county, in the State of Texas, do hereby certify that the foregoing answers and depositions of John M. Crockett, the witness before named, were made before me, and were sworn to and subscribed before me by the said witness on this day and date.

In testimony whereof I hereunto set my hand and notarial seal this 8th day of June, A. D. 1880.

595 CHARLES FRED. TUCKER,
Notary Public, Dallas Co., Texas.

And defendant also produced and read upon the hearing the deposition of Josiah F. Crosby, as follows:

In the Circuit Court of the United States, 5th Circuit and Western District of Texas.

Wm. Preston, executor, &c., of George Hancock, dec'd, complainant,		
No. 98.	*vs.*	In Chancery.
Wm. C. Walsh, Com'r Gen'l Land Office of Texas, and successor in office to J. J. Groos, dec'd, defendant.		

Interrogatories to be administered to Josiah F. Crosby, a resident of Harris county, Texas, and a material witness to be produced, sworn, and examined under and by virtue of the annexed commission, before the commissioner therein named in the above-entitled cause on the part of the defendant:

596 First Interrogatory:

What is your age and your occupation, and where do you reside, and where have you resided for the past forty years? State the particular localities in which you have resided during said period of time, and the corresponding dates of such residences, and the length of time you resided at each place respectively, as nearly as you can remember.

Second Interrogatory:

Where did you reside in the years 1846, 1847, and 1848, and what was your occupation or profession during those years; and what office, if any, did you hold during those years, or either of those years, and which of said years?

Third Interrogatory:

If you state in answer to second interrogatory that during said years 1846, 1847, and 1848, or either of said years, you held the office of district attorney in the State of Texas, then state the time

you held said office, and of what judicial district were you the district attorney? What counties did said judicial district embrace; who was the judge of said judicial district at the time you held said office of district attorney, and is the said judge now living or dead?

Fourth Interrogatory:

597 If you state in answer to third interrogatory that the county of Navarro was embraced in the judicial district of which you were district attorney, then state if you have any recollection or knowledge of a suit instituted in the District Court of said county in the year 1846 wherein A. C. Horton, Governor of Texas, was the plaintiff, and Charles F. Mercer and others was the defendant; said suit instituted by J. W. Harris, Attorney-General of Texas, for the purpose of obtaining a decree of said court declaring forfeited the contract made between Sam Houston, President of the Republic of Texas, and Charles Fenton Mercer, of date January 29, 1844, known generally as the "Mercer Colony contract." If you have any knowledge or recollection of said suit, state all you remember in relation thereto, and state whether you ever had any connection with said suit, and if so, at what time, and what was that connection, and the facts fully in relation to said suit, and your connection, if any, with it.

Fifth Interrogatory:

If in answer to the fourth interrogatory you state that as district attorney you appeared for and represented the State of Texas, the plaintiff therein, state at what time you so appeared and represented said State, and what was done by you in and about said suit.

Sixth Interrogatory:

598 What counsel, if any, represented the defendants, or any of them, and which of them, in said suit, and are said counsel living or dead?

Seventh Interrogatory:

Was said suit tried in said court; if so, what connection, if any, did you have with said trial? When was said suit tried? Was the trial of the same by the judge of said court only, or by a jury also? What counsel represented the plaintiff on said trial? What counsel represented the defendants on said trial?

Eighth Interrogatory:

Was there any evidence adduced upon the trial of said cause by either party thereto, and which party; if so, was said evidence oral or by deposition, or both? Do you remember the name of any of the witnesses who testified in said cause? If so, state their names, and state if such witnesses are living or dead, and if living, state their residence if you know.

Ninth Interrogatory:

If you state that evidence was adduced on the trial of said suit, state as well as you can remember the character of such evidence; the amount of the same, whether little or much; to what issues or questions involved in said *said* suit was the evidence directed, and, as far as you can remember, state the substance of such evidence?

Tenth Interrogatory:

What judge presided at the trial of said suit? Is he living or dead? Who was the clerk of said court at the date of said
599 trial, and is he living or dead? What attorneys, if any, do you remember as being present on the occasion of the trial of said suit? Which of them, if any, were connected with the trial of said suit, and in what manner were they so connected, and are they living or dead? What was the result of said trial of said suit?

Eleventh Interrogatory:

Were any steps taken by any one connected with said suit to preserve or perpetuate the evidence adduced upon the trial of said suit; if so, what was done to preserve or perpetuate said evidence, and by whom and at what time?

Twelfth Interrogatory:

If, in answer to eleventh interrogatory, you state that at the time of the trial of said suit a statement of facts or evidence adduced in said suit was prepared and filed among the papers in said suit in said court, state the nature and extent of such statement; by whom was it prepared; what did it contain; by whom was it signed, if any one; what was done with it; and if filed in said suit, by whom was it filed, at whose instance was it filed, and by whose order or authority was the same filed? State fully and particularly all you may know in relation to said statement of facts.

Thirteenth Interrogatory:

Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this
600 cause, or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

PEELER & MAXEY,
WILLSON & GAINES,
Solicitors for Defendant W. C. Walsh.

Cross-interrogatories to the above-named witness:

Cross-Int. 1:

Are you the same person who was, while yet a minor, admitted to practice law by the act of January 10, 1848, at the same time that A. H. Willie and F. B. Sexton were so admitted to practice? If

yea, were you twenty-one years old on September 28, 1848? If not, about how old were you then?

Cross-Int. 2:

Did you ever see George W. Paschal or W. G. Hale in Corsicana in September, 1848, or at any other time? Did you know them? If yea, when did you first make their acquaintance?

Cross-Int. 3:

Were you in attendance on the court in September, 1848, in Corsicana? In what month and year were you commissioned as district attorney?

Cross-Int. 4:

600A If any attorney appeared for the defendants in said cause, please explain why the record recites that none appeared. And why was a statement of facts entered in the judgment as in cases of judgment in suits by publication?

Cross-Int. 5:

Please state fully any fact in connection with this matter, which you have been asked about, that will benefit either party to this suit. Please be full and particular.

HANCOCK, WEST & NORTH,
Sols. for Compl't.

In the Circuit Court of the United States, 5th Circuit and Western District of Texas.

Wm. Preston, executor, &c., of George Hancock, deceased, complainant,
vs.
Wm. C. Walsh, Commissioner General Land Office of Texas, and successor in office to J. J. Groos, defendant. } In Chancery.

Answer of Josiah F. Crosby to the accompanying interrogatories, propounded to him in the above-entitled cause, taken before W. N. Shaw, a notary public of Harris county, Texas, duly commissioned and qualified, in accordance with and by virtue of the written agreement between the parties to said cause.

600B *Answers of the witness Josiah F. Crosby.*

To the First Interrogatory he answers:

I am in my fifty-second (52d) year; am a lawyer residing in Houston, Harris county, Texas. I resided from the year 1838 to 1852 in Washington county, State of Texas. From 1852 to 1862 I resided in El Paso county, in the State of Texas. From 1862 to 1865 I

resided in the Confederate army, and from 1865 to the present time in Houston, Texas.

To the 2d Interrogatory he answers:

I resided in the county of Washington, as aforesaid, during the years mentioned. I was district attorney of the third judicial district from the year 1848 to the spring of 1852. The State records will show.

To the 3d Interrogatory he answers:

I have stated the time I held said office according to my remembrance, and stated that it was the (3d) third judicial district, which composed at that time the counties of Washington, Brazos, Robertson, Leon, Limestone, McClellan, Bell, Milam, and Burleson. The Honorable R. B. Baylor was Judge of said district. According to my information he is now deceased.

To the 4th Interrogatory he answers:

I have a distinct recollection of a suit wherein the Governor of the State of Texas was plaintiff and Charles Fenton Mercer and others were defendants, as pending in said county at the time of my first official attendance upon said Navarro court. The suit was brought, according to my recollection, by the Honorable John
600c W. Harris, Attorney-General of the State of Texas, with whom, immediately succeeding my appointment as district attorney, I held frequent conferences as to said suit. I don't remember now whether it was on my first or second attendance at said court that the suit you describe substantially was brought to trial. I was assisted in the prosecution of said suit by the Honorable Richardson Scurry and General Tarrant, who represented certain locative interests within the bounds of the so-called Mercer Colony.

To the 5th Interrogatory he answers:

I did appear in said suit in behalf of the State under the instructions of the Attorney-General, John W. Harris, and was recognized as the leading counsel in the prosecution of said suit. I believe that the records will show that said suit was formally and properly brought and conducted, resulting in a judgment and decree in favor of the State of Texas and against the said Mercer and his associates. I don't now remember who were the counsel appearing in the case for the defendants. My remembrance is that such papers as were filed in the cause were signed by William G. Hale as attorney for the defendants. Hale, according to my remembrance, was not present at the trial, and, as I remember, such counsel as were present made no special effort in the case because of the absence of Hale and the want of a knowledge of the line of defense intended to be adopted by Hale.

601 To the 6th Interrogatory he answers:

Hale is now dead.

To the 7th Interrogatory he answers:

Said suit was tried in said court. I have stated my connection with it. According to my remembrance, it was either at the spring or fall term of 1848. The record of the case will show better than my memory, whether the suit was tried solely by the judge or by a jury also. My impression, however, is that upon consultation with associate counsel, a jury was called and a verdict upon the facts rendered by them. I will state also that I was assisted in the prosecution of the case in behalf of the State by the Honorable James Willie, now deceased. I do not recall at this time the names of defendant's counsel.

To the 8th Interrogatory he answers:

Yes. There was very considerable evidence adduced upon the trial by the plaintiff. My remembrance is that the facts were fully gone into, and abundant evidence introduced, upon which it was deemed essential to base the verdict and decree. I don't now remember the names of all the witnesses who testified in said case, but I know that there were quite a number of witnesses who were fully examined as to the facts sought to be established by the State in forfeiture of said so-called Mercer Colony contract. Their names I cannot recollect, nor can I say whether they are living or dead.

602 To the 9th Interrogatory he answers:

My remembrance is that the witnesses were numerous, and that they were fully interrogated, and answered as above. The witnesses were questioned, and gave answers touching all the allegations made in plaintiff's petition. We were satisfied that the evidence as to forfeiture of the said contract was conclusive before the case was submitted.

To the 10th Interrogatory he answers:

I have stated the name of the judge who presided at the trial of said suit. I have stated that he is dead. My remembrance is that a Mr. Riggs, whose given name I don't now recall, was clerk of the District Court on that occasion. Whether he is dead or not I do not know. I met him in seeming good health, some four or five years hence in Houston. My remembrance is that among other lawyers who were present when said suit was tried is Judge David Prendergast, Judge M. C. Winkler, and I think the Hon. John Sayles. Neither of these parties, to my remembrance, were connected directly with the suit. The result of said suit was, as I have before stated, a verdict in favor of the State, and a decree of forfeiture of the said contract.

To the 11th Interrogatory he answers:

I am under the impression that care was taken to preserve the testimony adduced on said trial, by writing the same down
603 and having it signed by the several witnesses, and attested by the clerk of the court, though I cannot be confident on

this point. I don't remember whether this testimony so written down was filed with the records of the case, or forwarded to the Attorney-General. The Honorable John W. Harris, who was the Attorney-General, is still living, and in Galveston I believe. My remembrance is that I made to him, as my superior officer, a full report as to all matters pertaining to said suit and trial.

To the 12th Interrogatory he answers:

I have stated in answer to the manner in which said evidence was taken down all that I remember about it. I think if it is in evidence and shown to me, I should be able to say more with regard to it, and especially by whom it was written, and I should also remember the particular witnesses by whom the statements were signed. I am satisfied that there was a statement of facts made up in the case, as it was expected that an appeal would be taken by the defendants, and it was deemed prudent to preserve the facts in the case as a guard against the contingency of death of some of the witnesses.

To the 13th Interrogatory he answers:

I don't now remember any other material facts pertaining to this case, except that this deponent never received any pay from the State for his services in said case, which was from time to time promised him by certain officials.

604 *Answers of witness Josiah F. Crosby to Cross-Interrogatories.*

To the 1st Cross-Interrogatory he answers:

Yes. I was not twenty-one years old at the time indicated. I was in my 20th year, September 28th, 1848.

To the 2nd Cross-Interrogatory he answers:

I did not see Hale there, and I am not sure as to Paschal. I know that I saw Paschal in my early service as district attorney at some of the courts in the then 3d judicial district, whether as early as 1848 or not I can't say. I subsequently knew both Paschal and Hale. My earliest recollection of Paschal is that I met him some time between 1848 and 1851, at some point in my then district. I made his acquaintance when I first met him. I never knew Mr. Hale personally until several years afterwards, meeting him, according to my recollection, in Galveston.

To the 3rd Cross-Interrogatory he answers:

I can't remember whether it was September, 1848, or not, but am positive that I was present and officiated as the State's counsel, aided by the Honorable James Willie, now deceased, in the conduct of the cause mentioned in the direct interrogatories. I will not be positive as to the precise term at which said trial occurred.

To the 7th Interrogatory he answers:

Said suit was tried in said court. I have stated my connection with it. According to my remembrance, it was either at the spring or fall term of 1848. The record of the case will show better than my memory, whether the suit was tried solely by the judge or by a jury also. My impression, however, is that upon consultation with associate counsel, a jury was called and a verdict upon the facts rendered by them. I will state also that I was assisted in the prosecution of the case in behalf of the State by the Honorable James Willie, now deceased. I do not recall at this time the names of defendant's counsel.

To the 8th Interrogatory he answers:

Yes. There was very considerable evidence adduced upon the trial by the plaintiff. My remembrance is that the facts were fully gone into, and abundant evidence introduced, upon which it was deemed essential to base the verdict and decree. I don't now remember the names of all the witnesses who testified in said case, but I know that there were quite a number of witnesses who were fully examined as to the facts sought to be established by the State in forfeiture of said so-called Mercer Colony contract. Their names I cannot recollect, nor can I say whether they are living or dead.

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To the 3rd Cross-Interrogatory he answers:

I can't remember whether it was September, 1848, or not, but am positive that I was present and officiated as the State's counsel, aided by the Honorable James Willie, now deceased, in the conduct of the cause mentioned in the direct interrogatories. I will not be positive as to the precise term at which said trial occurred.

To the 4th Cross-Interrogatory he answers:

I have stated that I don't remember that any attorney took an active part in the defense. The statement of facts were made up for the reasons stated in my former answer. I have stated in
605 regard to this suit as much as I can remember upon the spur of the moment. I might probably state a great many other facts material to the issue for one party or the other were I in possession of, or could see, the records of the case.

J. F. CROSBY.

STATE OF TEXAS,
Harris County.

I, W. N. Shaw, notary public, of Harris county, do hereby certify that the foregoing answers of Josiah F. Crosby, the witness before named, were made before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and official seal this, the 22nd day of November, 1880.

W. N. SHAW,
Notary Public, Harris Co., Tex.

605½ And defendant also produced and read upon the hearing the deposition of J. M. Riggs, as follows:

In the Circuit Court of the United States, Fifth Circuit and Western District of Texas.

Wm. Preston, ex'r, &c., of George Hancock, dec'd, complainant,
No. 98. *v.* } In Equity.
W. C. Walsh, Comm'r, &c., successor of J. J. Groos, Comm'r, &c., defendant.

Interrogatories to be administered to J. M. Riggs, a resident of Navarro county, Texas, a material witness to be produced, sworn, and examined on the part of the defendant:

First Interrogatory:

What is your age and occupation, and where do you reside?

Second Interrogatory:

If you reside in Navarro county, Texas, state how long you have resided there. In what year did you immigrate to Texas, and at what particular place did you locate in Texas, and at what places in Texas have you resided since that time?

Third Interrogatory:

Were you at any time the clerk of the District Court for the county of Navarro, Texas? If yea, state at what date you
606 became such clerk, and during what time did you hold

said office, and where did you reside during the time you held said office.

Fourth Interrogatory:

Who was the judge of said District Court when you became the clerk of said court for said Navarro county, and who was your immediate predecessor in said office of clerk of said court?

Fifth Interrogatory:

Were the records of said District Court of Navarro county aforesaid and the records and papers of the office of the clerk of said court ever destroyed? If so, how were they destroyed and when were they destroyed, and what were your opportunities for knowing they were destroyed, and who was the clerk of said court at the time they were destroyed?

Sixth Interrogatory:

Was there at any time within your knowledge a suit pending in said District Court of Navarro county, wherein A. C. Horton, Governor of Texas, was the plaintiff, and Charles F. Mercer and others were defendants? If you answer yea, then state, if you know, the nature of said suit—the object and purpose of said suit—when was it instituted—and when was it finally disposed of in said court, and how was it disposed of?

Seventh Interrogatory:

607 If you answer the sixth interrogatory that you knew of the said suit pending in said court, then state whether or not the papers and records of the proceedings in said suit are now in existence, and if not now in existence, state, if you know, what became of said papers and records, and your means of knowing the facts you state.

Eighth Interrogatory:

If, in answer to interrogatory sixth, you state that said suit was tried in the said District Court of Navarro county, state when said trial took place and whether or not you were present at said trial. Who was the judge that presided at said trial; is he now living or dead? Was said trial before the judge alone, or was it a trial by jury also? Who was the clerk of said court at the time of said trial? What counsel, if any, represented the plaintiff in the trial of said suit? And what counsel, if any, represented the defendant in the trial of said suit? Are any of the counsel who were engaged in the trial of said suit now living? If so, which of them, and where do said counsel reside? If said trial was by jury, are any of the jurors who tried the case now living? If so, name them and state their residence, if you know.

Ninth Interrogatory:

What were the issues or questions involved upon the trial
608 of said suit? Was there any evidence adduced upon said

trial by either party, and if so, by which party, and what was the character of such evidence, written or parol, by depositions or by witnesses produced in court? What was the substance of said evidence, as near as you can remember it?

Tenth Interrogatory:

What was the result of the said trial of said suit?

Eleventh Interrogatory:

Did you, while clerk of the District Court of Navarro county aforesaid, make out a certified transcript of any of the papers and proceedings in the said suit of A. C. Horton, Governor, &c., *vs.* Charles F. Mercer and others? If so, state when you made such transcript? At whose request did you make it? To whom did you deliver it? What was done with said transcript, and what did said transcript contain?

Twelfth Interrogatory:

Are you acquainted with the boundaries claimed to be the boundaries of the Mercer Colony? If so, state location of Navarro county aforesaid with reference to said boundaries.

Thirteenth Interrogatory:

What settlers, if any, within your knowledge, were ever introduced and settled in said Mercer Colony by Charles F.
609 Mercer or his associates? Name them, and state the time when they were so introduced and settled.

Fourteenth Interrogatory:

Who, if any one, introduced and settled the settlers of your acquaintance in said Mercer Colony? Who built their houses, surveyed their lands, furnished them with arms and ammunition, if any one? State fully all you know about the settling of immigrants in said colony, stating the time of settlement and your means of knowing the facts you state.

Fifteenth Interrogatory:

Are you acquainted with any portion of the Trinity River, and if so, with what portion of it are you acquainted, and when did you first become acquainted with it, and what have been your opportunities for being acquainted with it?

Sixteenth Interrogatory:

Are you acquainted with the creeks which empty into the said Trinity River within the boundaries claimed to be the boundaries of Mercer's Colony, or with any of said creeks? If so, state which of said creeks you are acquainted with, and when you first knew them, and your opportunities for knowing them. Name the creeks which empty into said Trinity River on the west side of said river, beginning with the first creek you are acquainted with south of the

city of Dallas, and naming them in the order in which they are found, on down the river as far as you know them, and state
610 the particular locality of each creek as far as you can, and the point at which each empties into the said Trinity River, and the size of each of said creeks, and the name by which each of said creeks was known when you became acquainted with them.

Seventeenth Interrogatory:

Are you acquainted with any creek or creeks on the west side of said Trinity River called "Cedar"? If so, describe the particular locality and the size of said creek or creeks, and into what stream or streams does the said creek or creeks empty, and at what point or points?

Eighteenth Interrogatory:

If you state that you know two creeks called "Cedar" on the west side of said Trinity River, describe particularly the lower one, and state whether or not it empties into said Trinity River; and if it does not, into what stream does it empty, and at what distance from said Trinity River, and does the stream into which it empties empty into said Trinity River, and if so, at what point?

Nineteenth Interrogatory:

Are you acquainted with the stream at the mouth of which the line claimed by Mercer as the southern boundary line of his colony crosses the said Trinity River? If you are, then describe said stream. What is the particular locality of it? How far is it below the city of Dallas? When did you first know this stream? What was it called when you first knew it? If you have ever heard it
611 called "Cedar Creek," when did you first hear it called by that name? Ltate particularly all you know about said creek and your means of knowing the facts you state.

Twentieth Interrogatory:

Are you acquainted with a creek called "Cedar" which empties into the Trinity River on the east side of said river? If so, describe said creek, its size, locality, &c., and the point at which it empties into said river.

Twenty-first Interrogatory:

Have you any knowledge that the boundary lines of the said Mercer Colony were at any time ever surveyed and marked? If you have, state your knowledge thereof fully and particularly. Have you ever been over any of the country where either of the boundary lines of said colony are claimed to be? If so, which of said lines, and what indications, if any, did you observe that any such line had been surveyed and marked?

Twenty-second Interrogatory:

Did you ever receive any land as a colonist in said Mercer Colony?

If so, how much; when did you receive it; how did you obtain it, and from or through whom did you obtain it?

Twenty-third Interrogatory:

Were your ever acquainted with any of the following named persons, viz.: Robt. Lee, Wm. G. Lee, Jane Warden, Thomas C. Byrd, Daniel Shapard, Rich'd Byrd, Thos. Proctor, Wm. Garrett, Jonathan Wilkins, Orang B. Prentiss, Isaac Wilkins, Mary Wil-
612 kins, Geo. Sterrett, Jessee Yarborough, Peter Lee, Wm. Allen Brown, Wiley Jones, Milton D. F. Gerald, John Carter, Matthew R. Wilkins, Silas M. Havins, John Garrett, Thomas Havins, John P. Havins, Wm. McCarrell, Franklin Marrs, David H. Havins, Mark Rushing, Alex. D. Havins, H. Thomas Click, Lewis Marr, Hiram Shelley, King Fisher, Moses Fisher, Joseph M. Stirman, Sterling Shumat, James Hobbs, Wm. Downing, Abraham Watson, Wiley Steel, William Pinethorp, Simon Odell, John Odell, John Odell, Tho's Clevinger, Nehemiah Odell, Turner Odell, John Wallace, Eliz. Friend, Eliz. Robinett, Calomus Bukhart, Geo. Bullock, John Dunn, Wm. W. Hobbs, Johnston Shelton, Lemuel Shelton, John Custer, James Garrett, Wm. Stephens, Joseph Prewett, Drewry B. Koen, Wyatt Parker, Jacob H. Drean, Jessee Henshaw, Dan'l J. Gilmore, Wm. K. Newell, Chas. R. Saunders, sr., H. K. Newell, Chas. R. Saunders, jr., Matthew Lancaster, Sterling Lancaster, Robert P. Lancaster, James Powell, B. B. Dowell, Geo. Reevis, Peter High, John W. Shirley, Thos. Denton, Henry Hunter, Geo. B. Denton, Alfred Carlyle, John M. Denton, James Noble, A. C. Ransom, John Hardin, David Carlyle, Henry Ratts, Wilson Fogeman, David Rogers, Andrew H. Henry, Jessee Zinc, John Y. Beck, Thos. J. White, Larken Cupps, Nath'l Dougherty, Reuben Deweye, Wm. Paddix, Wm. Dougherty, H. M. Daugherty, N. Daugherty, Jacob Deweye, Leonard Eastwood, Alex. Eastwood, Wm. T. White, John Eastwood, Jas. M. Maner, John Damron, John J. Damron, Thacker Vivian, James Vivian, Thomas Vivian, Victor Purnell, Elisha Browning, John Pennington, Brown C. Roberts, Levi Pennington?

613 If so, which of them did you know, when did you know them; where did they reside when you knew them; in what colony, if any, were they settled; what was the extent of you acquaintance with the settlers of said Mercer's Colony in 1845, 1846, 1847, and 1848? What proportion of the male settlers in said colony were you acquainted with in each of the years named respectively?

Twenty-fourth Interrogatory:

Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

WILLSON & GAINES,
PEELER & MAXEY,
Counsel for Defendant.

614 Cross-interrogatories to be propounded to said witnesses:

Cross-Int. 1:

Were you the district clerk of Navarro county in October, 1846? If not, who was, and is he dead or alive? If alive, where does he live, and if dead, where did he die? Who was the district attorney in 1846, and is he dead or alive? And if alive, where does he live?

Cross-Int. 2:

Who was the district clerk of that county in September, 1848? And is he dead or alive? If dead, where did he die? If alive, where does he live? Who was the district attorney of the district to which Navarro county belonged in 1848? Is he dead or alive? If dead, when did he die? If alive, where does he live?

Cross-Int. 3:

Did you, in 1846 and in September, 1848, personally know John W. Harris, who was then the Attorney-General of Texas? If yea, did you ever, in 1846 or 1848, see him at Corsicana? If yea, what was his ostensible business there, and in what months of each year (1846–1848) was he there, and in what capacity?

Cross-Int. 4:

How long have you lived in Corsicana and its vicinity? When did you first commence to live there and during what years have you lived there? What was the population of Corsicana in 1846? And what was it in September and October, 1848?

615 Cross-Int. 5:

Did you know Geo. W. Paschal, formerly an attorney-at-law at Austin, Texas, and known as the author of Paschal's Digest? If yea, when did you first know him, and how long have you known him? Did you ever see him in Corsicana? If yea, when, and on what ostensible business, was he there? Did you see him there in 1846 or in 1847, or at any time in 1848? In what year did Geo. W. Paschal come to Texas, and where was he living in 1846, 1847, and 1848? In or out of Texas?

Cross-Int. 6:

Did you ever know a lawyer by the name of William G. Hale? If yea, where did you know him, and when did you first become acquainted with him? Did you know him in 1846, 1847, or 1848? Did you see him in Corsicana during any of these years? If yea, state all about his visits and business there.

Cross-Int. 7:

Did you know Josiah F. Crosby in 1846, 1847, and 1848? When and where did you first know him? How old was he then? How old is he now? Is he dead or alive?

Cross-Int. 8:

Were you in court when the case of A. C. Horton, Governor of the State of Texas, *v.* C. F. Mercer, about which you have been asked, was finally disposed of? If so, does not the record of
616 the court of what transpired, of who represented the State, and who represented the defendant, furnish to you better evidence of what did transpire than your own memory?

Cross-Int. 9:

If you say that any attorney did appear for defendant in that suit, give his name, and state all that he did as fully as you can now remember. State his acts. State where he boarded or staid. Name some individual besides yourself who saw him there at that time. Who was the presiding judge on September 24th, 1848?

Cross-Int. 10:

State if you knew personally Chas. F. Mercer, or any of his associates, and where did you know them. Name them. Did you know Jacob Elliott to be one of them? State in this connection any act of said Chas. F. Mercer, or of any of his agents or sub-agents, or of any of his associates or of their agents, with reference to the colonization or the defining of the boundaries and lines of said colony. State fully all the facts you may know in this connection.

Cross-Int. 11:

Name as many as you can of the persons who were in fact, or were generally believed to be, colonists of Mercer, and to whom certificates as such colonists were issued, or to which they were entitled. Be full and particular.

Cross-Int. 12:

617 Did you know or ever hear in Mercer's Colony of Dr. Daniel Rowlett, of Fannin county, as one of the agents or sub-agents of Mercer's Colony? Do you know anything of any colonists being introduced by him? Or of his having taken steps in 1844 or 1845 to obtain a list of the settlers within Mercer's grant who were willing to be received as colonists? State as fully as you can all that you may know in this connection?

Cross-Int. 13:

State, if you know, the names of any persons who acted as surveyors in Mercer's Colony and helped to survey in said colony under Gen'l Chas. F. Mercer, or any of his agents or associates. Please name such surveyors, and state where do they now live, if alive.

Cross-Int. 14:

Did you know B. J. Chambers, sometimes called Ben Chambers, who for years lived in Ellis, Limestone, and Navarro counties, and who now lives in Johnson county, Texas? If yea, state what you know, if anything, as to his surveying for Mercer or his colonists.

Cross-Int. 15:

Did you know J. M. Crockett? If yea, what did he have to do with Mercer's Colony? Be full and particular.

Cross-Int. 16:

State any other fact or facts in your recollection bearing on the matters enquired about above, and tending to shed light on the questions either as to the suit or the boundaries of the colony, or
618 the colonization of it, or any other matter in that connection.

Please take your time, and state fully all you may know about these matters.

HANCOCK, WEST & NORTH,
Sol's for Compl't.

In Circuit Court of the United States, Fifth Circuit and Western District of the State of Texas.

Wm. Preston, ex'r, &c., of George Hancock, dec'd, complainant,
No. 98. *vs.*
W. C. Walsh, Com'r, &c., successor of J. J. Groos, Com'r, &c., defendant.

Answers to interrogatories propounded to J. M. Riggs in a certain suit pending in the Circuit Court of the United States, 5th circuit, western district, Texas, wherein Wm. Preston, ex'r, &c., is plaintiff, *v.* W. C. Walsh, Com'r, &c., defendants.

Answer to 1st Int'y:

My age is 71 years; I am a land agent, and I live in Corsicana, Texas.

619 Answer to 2d Int'y:

I have lived in Navarro county before it became a county, and up to this time. I came to Texas in 1845, settled on Red Oak Creek—which is now in Ellis county—and from there moved to Corsicana, in 1849, where I have lived ever since.

Answer to 3d Int'y:

I was. I became such dist. clerk in 18 , and held said office until the year 1856. I resided on Red Oak when first appointed and in Corsicana the balance of the time.

Answer to 4th Int'y:

R. E. B. Baylor. W. B. P. M. B. H. Nicholson was my predecessor in office.

Answer to 5th Int'y:

They were. By the burning of the court-house on the 13th day

of November, 1855. I only know the house was burned up. I was living in the town at the time. I was clerk at the time.

Answer to 6th Int'y:

There was such a suit pending. The nature of the suit was to rescind a contract with Charles Fenton Mercer and his associates. It was instituted in 1847 or '48. I think it was disposed of in 1849 or '50. Don't remember exactly. The plaintiff gained the suit, and judgment was entered for said plaintiff.

Answer to 7th Int'y:

620 The defendants appealed the case to the Supreme Court, and I made out two transcripts, one for the defendant's attorneys and the other for the Attorney-General. These transcripts I sent to Austin, and do not know what became of them. The original papers, I think, were destroyed by the fire. I have stated my means of knowing in answer to fifth interrogatory.

Answer to 8th Int'y:

Don't remember whether said trial took place in 1849 or '50. I was present at said trial. Judge Baylor presided, and is now dead. It was a trial by jury. I was the clerk of dist. court at the time. Judge Richard Scurry and E. H. Tarrant and W. F. Henderson were the attorneys representing the plaintiff. I do not remember whether any counsel represented the defendants. W. F. Henderson is now the only one of said counsel living, and resides in Navarro county, at Chatfield. None of the jurors are living that I know of.

Answer to 9th Int'y:

The State denied that Mercer had complied with his contract. There was some evidence adduced by the plaintiff, but I do not remember what it was, nor its character; nor do I remember whether it was by deposition or by witnesses in court.

Answer to 10th Int'y:

I have answered this in int. 6th as fully as I know.

621 Answer to 11th Int'y:

I have answered this in int'y 7th as fully as I know.

Answer to 12th Int'y:

I know nothing of the boundaries of the Mercer Colony, except from hearsay and a map sent me from the land office. If that map be correct the southern boundary of said colony would run through the northern portion of Navarro county, cutting off the northeast corner of said county.

Answer to 13th Int'y:

There were some few settlers in the county when I first came to Texas. There were a few settlers within the supposed limits of

the colony. Don't know who they were introduced by. Wiley Jones, Hampton McKinney, J. O. McKinney, James George, J. L. McKinney, John Richardson, and several others whose names I have forgotten settled here in 1846, but I do not know who introduced them. These were all on the west side of Trinity River. There were some settlements on the east side, but I do not now remember the names.

Answer to 14th Int'y:

I do not know that any person introduced them. So far as I know they built their own houses; furnished their own ammunition.
622 One W. N. Anderson, who claimed to be an agent for Mercer, surveyed some few tracts of land in this county, for which, I think, the emigrants paid. The emigrants came in 1846 and '47. I was residing in what was then Navarro county, which was supposed to be within the limits of Peters's Colony, and I knew personally all those I have mentioned, and many more that I do not now remember.

Answer to 15th Int'y:

I am. I am acquainted with different portions of it from the city of Dallas to the southern boundary line of Navarro county. I first became acquainted with it in the winter of 1845, at Dallas. I have crossed it time and again at divers times and places.

Answer to 16th Int'y:

I am. The first creek that empties into the Trinity River on the west side south of Dallas is Cedar Creek. It is about seven miles long. The next is Five-mile Creek, about five miles long. The next is Pleasant Run, or Ten-mile Creek, about 15 miles long. The next is Red Oak Creek, about 15 miles in length. The next is Richland Creek, about 50 miles in length, and which empties into the Trinity in Freestone county.

Answer to 17th Int'y:

I have described the only creek I know of that name in the
623 foregoing interrogatory. It empties into the Trinity River 3 or 4 miles below Dallas.

Answer to 18th Int'y:

I only know one "Cedar" Creek that empties into the Trinity from the west side. There is a Cedar Creek 7 or 8 miles S. E. of Corsicana that empties into Chambers Creek.

Answer to 19th Int'y:

I have answered all I know about any creek called "Cedar" which is on the west side of the Trinity River. I have been crossing said creek at different times for the last 34 years.

Answer to 20th Int'y:

I am. It empties into the Trinity about 28 miles east of Corsi-

cana. It is a large stream, nearly as large as the Trinity. I think the source is in Rockwall county, and it runs parallel with the Trinity until it empties.

Answer to 21st Int'y:

I know nothing about it.

Answer to 22d Int'y:

I did not, but I did receive some from Peters's Colony.

Answer to 23d Int'y:

I only knew Wiley Jones, though many of the names are familiar to me. I think most of them lived in Anderson, Van Zandt, and Kaufman counties. I was acquainted with nearly every man from the Navarro county line to the Dallas county line, but I do
624 not know how many were settlers of Mercer's Colony. I was acquainted with every man west of the Trinity River at that time who was within the supposed limits of said colony.

Answer to 24th Int'y:

I have stated all I know.

Answers to Cross-Interrogatories.

Answer to Cross-Int'y 1:

I was not. W. B. M. P. C. H. Nicholson, or some such name, was the district clerk at that time. I do not know whether he is dead or alive. I think a man by the name of Ramrod Johnson was district attorney in 1846. I do not know whether he is dead or alive.

Answer to Cross-Int'y 2:

I was. I live in Corsicana. I think J. F. Crosby was dist. attorney in 1848, or Johnson, don't remember which. I do not know, but think Crosby is living at Houston, Texas.

Answer to Cross-Int'y 3:

I think he was here once in 1848, attending to a suit instituted by the Governor against C. F. Mercer and his associates.

Answer to Cross-Int'y 4:

I have lived in Corsicana and vicinity 31 years. I com-
625 menced living there the 9th day of August, 1849, and have been there ever since. The population of Corsicana in 1846 was 75 or 100. I don't know what it was in 1848; suppose 400 or 500.

Answer to Cross-Int'y 5:

I did. I have known him since '48 or '9. I have seen him in Corsicana, probably in '49. I am not certain, but think he was here as an attorney. Don't know when he came to Texas. Think he lived in Austin.

Answer to Cross-Int'y 6:

I did. I became acquainted with in Corsicana in 1848 or '9. I did not know him in '46 or '47. I think he was here in the same suit in which G. W. Paschal was in, a 11-league suit between B. J. Chambers and some one else. I forget the name of the other party to it.

Answer to Cross-Int'y 7:

I knew him in 1848 or 1849 in Corsicana. He was then 21 or 22 years of age. He is now about 53 years old. I think he is alive and lives in Houston.

Answer to Cross-Int'y 8:

I was present at said trial. The record would be better than my memory.

Answer to Cross-Int'y 9:

I do not think any attorney represented the defendant in
626 said suit. R. E. B. Baylor was presiding judge at that time.

Answer to Cross-Int'y 10:

I did not. I know of no acts of said agents in reference to said boundaries.

Answer to Cross-Int'y 11:

By order of the District Court I issued, as clerk, some 19 or 20 certificates, to whom I do not now remember, but will get the names and send them to you.

Answer to Cross-Int'y 12:

I knew of one Rowlett by reputation. He was connected with the Mercer Colony in some way, but I don't know how.

Answer to Cross-Int'y 13:

As answered to direct interrogatories, I knew a man by the name of W. N. Anderson, who represented himself as the agent of the Mercer Colony, and he did some surveying in this county as such agent. Anderson is now dead. He did live in this county, on Richland Creek.

Answer to Cross-Int'y 14:

I knew B. J. Chambers. I know nothing of his surveying for Mercer or his colonists.

Answer to Cross-Int'y 15:

627 I know J. M. Crockett. He issued certificates to the settlers of Mercer's Colony. That is all I know of his connection with it.

Answer to Cross-Int'y 16:

Chas. F. Mercer built a warehouse on the east bank of Trinity

River and the western boundary of Henderson county. It was represented to contain ammunition and stores for settlers, but I never saw it. When the suit between the Governor and Mercer was finally decided, I issued, as clerk of the District Court, an execution against Mercer and directed it to the sheriff of Henderson county. He levied it on the warehouse. This is all I know about the matter.

J. M. RIGGS.

THE STATE OF TEXAS, }
County of Navarro. }

I, R. W. Walton, J. P. Prec't No. 1, and ex-officio notary public for Navarro county, do hereby certify that the foregoing answers of J. M. Riggs, the witness before named, were made before me and were sworn to and subscribed before me by the said witness.

Given under my hand and official seal this 23d day of August, A. D. 1880.

R. W. WALTON,
J. P. Precinct No. 1, and ex-officio notary public Navarro County, Texas.

628 And the defendant also produced and read upon the hearing a certified copy of the proceedings of the District Court of Navarro county in the case of A. C. Horton, gov., *v.* Charles F. Mercer et al., as follows:

THE STATE OF TEXAS, }
County of Navarro. }

To the Hon. R. E. Baylor, Judge of the Third Judicial District of said State:

The petition of Albert C. Horton, acting governor of the State of Texas, and a resident citizen of the county of Matagorda, who, in his official capacity as aforesaid, institutes this suit in behalf of the people of said State, would respectfully represent unto your honor that heretofore, viz., on the twenty-ninth day of January, eighteen hundred and forty-four, Sam Houston, president of the late republic of Texas, acting in behalf of said republic, of the one part, and Charles Fenton Mercer, of the city of Tallahassee, State of Florida, acting for himself and for such associates as he might choose, of the other part, made and entered into a certain contract in writing for the purpose of colonizing a part of the ungranted or unlocated of said republic, whereby the said C. F. Mercer, for himself and his associates, and his and their heirs, executors, and administrators
629 and assigns, covenanted and agreed with the said Sam Houston, acting as aforesaid, to introduce and settle within the limits in said contract described, or within limits as might be thereafter prescribed by the president of the republic of Texas, for the purposes aforesaid, within five years from the date thereof, as many

emigrant families as he and his associates could settle within said limits, at the rate of one family for every section of one mile square of vacant and unappropriated land within said limits, and were to have the said lands surveyed as needed for the purposes of settlement into sections of six hundred and forty acres, or into half sections of three hundred and twenty acres each at their option, and it was agreed that the number of families to be settled within each of the five years succeeding the date of said contract should not be less than one hundred in each and every year of said term, and the said parties agreed that the unlocated within said limits should be set apart for the purposes of said contract; and the said Sam Houston covenanted and agreed in behalf of the republic to give, grant, and convey to the said Mercer and associates, or their representatives, one section of six hundred and forty acres of land for each family, or two half sections of three hundred and twenty acres each, for each and every family so introduced and settled upon said lands, and titles therefor were to be made from the government of Texas. Each alternate section or half section of 640 or 320 acres was to be reserved to the republic, and could
630 be purchased or not by the said Mercer and his associates upon these terms, viz.: By paying twelve dollars, and also any bonds, promissory notes, or other audited liabilities of the republic to the amount of six hundred and forty dollars, the said Mercer and his associates, or their legal representatives, should be entitled to demand and receive from the government six hundred and forty acres of the alternate sections or half sections reserved as aforesaid, and a full and absolute title therefor was to be made accordingly, (upon the same terms;) the right to purchase all the lands that were so reserved to the public by the tenor of said contract the said Mercer and his associates were bound to convey to each and every family introduced and settled under said contract such number of acres as might be agreed on between him and his associates and said families, respectively, which number of acres was not to be less than one hundred and sixty, nor more than six hundred and forty to one family, or the said Mercer and associates could name the number of acres stipulated to be given to each family as aforesaid, and request that the deed of conveyance should be made therefor to the several families, respectively, or to their legal representatives, directly from the government of the republic, and in that case the remaining portion of a section or two half sections, as the said Mercer and his associates might desire, should be made by the government to them, the said Mercer and their associates, or to their legal repre-
631 sentatives; and as a recompense for their labor and expense in introducing and settling said families, the said Mercer and his associates were to receive from the government a premium of ten sections of six hundred and forty acres, or twenty half sections of three hundred and twenty acres of land for each and every hundred families introduced and settled under said contract, and full and perfect title therefor was to be made from the government accord-

ingly. It was further covenanted and agreed between the parties that unless the said Mercer and his associates, or their legal representatives, should prior to the first day of March, (1845) eighteen hundred and forty-five, introduced and settled on the lands designated in said contract, according to the tenor thereof, one hundred families, all the right, title of the said Mercer and his associates, and of his or their legal representatives, it was agreed should cease and determine, provided two hundred and fifty families should not be introduced and settled by them in manner aforesaid on or before the expiration of two years from the date of said contract; and it was further covenanted and agreed between the said parties that the said Mercer and his associates might purchase and settle any number of families on the alternate reserved sections as aforesaid, and that the like compensation or recompense should be allowed them for every hundred families settled thereon; all which will more fully appear by reference to a copy of said contract hereunto annexed as a
632 part of this petition for the purpose of exhibiting more clearly the terms and conditions thereof; and your petitioner says that by annexing to and making a part of this petition the copy of the contract aforesaid, he thereby intends to admit as evidence on the trial no allegation contained in it which it would have been necessary for the said Mercer and his associates to prove had such copy not have been annexed or made a part thereof.

Your petitioner further represents that according to the terms of said contract it might have been so carried out as to have operated as a monopoly of one million two hundred and eighty thousand acres of the public domain of said republic in the hands of said Mercer. He further represents that when said contract was made many citizens, soldiers, and creditors of the said republic had, by the laws and constitution thereof, a clear and indisputable, previously subsisting right to locate their claims for land upon any of the public domain which was thus attempted to be assigned and set apart. He further represents that the said Mercer and his associates, and his and their representatives, failed to introduce and settle one hundred families on lands in said contract described (and agreed to be set apart) according to the tenor thereof prior to the first day of March, eighteen hundred and forty-five; and he further represents that the said Mercer and his associates, and his and their representatives, also failed to introduce and settle on the lands in
633 said contract described (and agreed to be set apart) two hundred and fifty families on or before the expiration of two years from the date of said contract, according to the tenor thereof. Your petitioner further represents that the said contract was illegal; that it was made in violation of the constitution of the Republic of Texas; and that it was, therefore, null and void from the beginning. Your petitioner further represents that a portion of the lands designated in said contract, attempted to be assigned by it, is situated in the county of Navarro.

The premises considered, your petitioner prays your honor that

the said Charles Fenton Mercer and his associates, if any he has in said contract, may be cited to appear at the next term of your honorable court to be held in the county of Navarro and answer this petition, and that said contract may be decreed to be invalid, that it be decreed to be null and void from the beginning, and he prays for all such other and further relief as in law or equity he and those in whose behalf he institutes this suit may be entitled to.

(Signed,) JOHN W. HARRIS,
Attorney-General of the State of Texas, for Petitioner.

Endorsed: Governor *v.* petitioner C. F. Mercer. Filed
634 in my office this the 11th day of October, 1846. [Signed] W. B. M. P. H. Nicholson, clerk.

The Governor
v.
Mercer and others.

Petitioner further states and avers that the said Mercer and associates, defendants thereto, did not survey, designate, and mark the boundary of the territory thus set apart for them for purposes of colonization by the terms of the contract aforesaid, as by law and the spirit of said contract they were bound to do. Your petitioner further avers and charges that the terms of said contract fixes the southern boundary of said territory, so set apart as aforesaid, at a point on the River Trinity opposite to Cedar Creek, crossing said River Trinity at the lower bank of Cedar Creek, running thence to the mouth of the Aquilla on the River Brazos; that said Mercer and associates have run a line from the Trinity River to the Brazos, but not in accordance with the calls of the contract; that said line does not extend from the lower bank of Cedar Creek on the River Trinity to the
Aquilla on the River Brazos, as by the terms of said contract
635 they were bound to do, but run their southern line, commencing at a small spring branch on the River Trinity never known as Cedar Creek, some eighty miles below the Cedar Creek specified in their contract as the call on the Trinity River, from which a line should extend to the mouth of the Aquilla on the River Brazos, including thereby a region of country, in a triangular shape, containing some three thousand square miles more than by the terms of the contract they were entitled to. Your petitioner avers that the small spring branch, to which Mercer and his associates claim on the Trinity River, never was known as Cedar Creek, but was wholly nameless until christened Cedar Creek by Mercer and his associates. All of which is in violation of law and the contract entered into by the said Mercer and his associates with the President of the Republic of Texas and ruinous to the good citizens of the State of Texas. Your petitioner further charges and avers that the said Charles Fenton Mercer and associates have violated all and

singular the contracts and covenants contained in the contract of colonization, before referred to and made a part hereof.

[Signed] JOHN W. HARRIS,
Attorney-General of the State of Texas.
THOS. JOHNSON,
Dist. Attorney, 3 Judicial Dist.

636 The Governor
vs.
Charles Fenton Mercer and associates.

Thomas Johnson, district attorney of third judicial district, State of Texas, states on oath that he is informed and believes that defendant, Charles Fenton Mercer, is a non-resident of the State of Texas and beyond the jurisdiction of this court, and that his associates are unknown.

THOMAS JOHNSON,
District Attorney Third Judicial District, State of Texas.

Sworn to in open court March 25th, 1847.

SAM'L B. EARLE,
Clerk pro. tem.

THE STATE OF TEXAS,
County of Navarro.

I, W. B. M. P. H. Nicholson, clerk of the District Court of said county, hereby certify that the foregoing is a true copy of the original petition filed in my office October 11th, 1846, and of the amended petition filed March 25th, 1847.

Given under my hand and seal of the District Court of said county this 12th day of July, 1847.

W. B. M. P. H. NICHOLSON,
D. C., N. C.

637 STATE OF TEXAS,
County of Navarro.

To the Sheriff of said County, Greeting:

You are hereby commanded to summons Charles Fenton Mercer and his associates, unknown, to be and personally appear at and before the Hon. District Court of said county at the next term thereof, to be holden at the late residence of Wm. R. House, in said county, on the third Monday after the first Monday in October, A. D. 1847, by publication as the law directs, in the Northern Standard, then and there to answer the petition of Albert C. Horton, Governor of the State of Texas, acting in his official capacity in behalf of the people of said State, filed in said court against him, a copy of which petition accompanies this writ.

Herein fail not under the penalties of the law, and have you there then this writ, certifying how you have executed the same.

Witness W. B. M. P. H. Nicholson, clerk of the District Court of said county, and the seal of said court this 12th day of July, A. D. 1847.

(Signed) W. B. M. P. H. NICHOLSON,
D. C., N. C.

In obedience to the command of the above writ, I order the same, together with the accompanying petitions to be published in the Northern Standard eight successive weeks.

JAMES A. JOHNSON, *Sh'ff N. C.*

638 The Governor
No. 51. *v.*
Charles Fenton Mercer and his associates.

Be it remembered that on this the 25th day of September, A. D. 1848, there came on to be holden a District Court in and for the county of Navarro and State of Texas.

Present: The Hon. R. E. B. Baylor, judge of the third judicial district, James M. Riggs, clerk, and James A. Johnson, sheriff of said county, when the following proceedings were had in the above entitled cause, to wit:

The Governor
v.
Charles Fenton Mercer and his associates.

This day came the plaintiff by the district attorney, Josiah F. Crosby, and the defendant being solemnly called, came not, and it appearing to the court that service had been perfected, and two terms of the court having elapsed since publication, it is therefore ordered by the court that judgment final, by default, be rendered against said defendants in favor of said plaintiff. And thereupon came a jury of twelve good and lawful men, to wit, Daniel White, William Richey, William Billingsley, Peter Stout, Henry Cook, John Treadwell, Elias McKay, William L. Browning, B. L. Hain, Thomas J. Tinery, James Cox, and G. W. Senior, who, being duly elected, empanelled, and sworn the truth to speak, upon their
639 oaths do say: "We, the jury, find the facts and allegations in the petition to be true." And therefore it is ordered, adjudged, and decreed by the court that the contract of colonization, made and entered into between Sam Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the twenty-ninth day of January, eighteen hundred and forty-four, be, and the same is, hereby adjudged and decreed null and void. And it is further

ordered that the plaintiff recover his costs, for which execution may issue.

[Signed,] R. E. B. BAYLOR,
Judge, &c.

THE STATE OF TEXAS,
County of Navarro.

I, James M. Riggs, clerk of the District Court in and for said county, do hereby certify that the foregoing is a correct copy of the petition, amended petition, and all the orders and judgment of the court in the above entitled cause.

Given under my hand and seal of office, at office in Corsicana, this 12th day of Sept'b'r, 1854.

[SEAL.] J. M. RIGGS,
Clk D. C. N. C.

640 In the Circuit Court of the U. S. for the 5th Circuit, Dist. of Western Texas, at Austin.

Wm. Preston
No. 98. *v.* In Equity.
Wm. C. Walsh.

This cause coming on for hearing, the following testimony was adduced and read on the trial, to wit:

The complainant produced and read on the hearing the following depositions and papers, namely:

1. A certified copy of report of C. F. Mercer, made in 1845, Sept. 25, being exhibit F with bill.
2. A letter from C. F. Mercer, addressed to the Secretary of State of Texas, marked exhibit H, dated New Orleans, 1 Feb'y, 1847.
3. Communication of C. F. Mercer, addressed to Sec'y of State of Texas, dated Bonham, Fannin Co., Texas, 11 July, 1844, marked "Q."
4. Certified copy of colonial contract, marked exhibit "A" with bill.
5. Copy of original covenant and agreement between Mercer and associates, marked "B."
6. Form of certificate, Mercer's Texas Association, marked "R."
7. Copy of will of George Hancock.
8. Demand of complainant on defendant, marked "P."

641 9. Contract of Hancock with Paschal and Wickes.
10. Certified map Mercer Colony, marked "E."
11. Certificate of Keuchler, Land Com., marked "C."
12. Letter of T. H. Duvall to Birchett, 22 Feb., '54.
13. Receipt Allen & Hale, 11 Feb., 1853.

14. Letter of C. F. Mercer, 19 May, 1857.
15. Letter Paschal & Duval, 14 June, 1854.
16. Certified copy report J. M. Crockett.
17. Affidavit J. M. Brown.
18. Memorial of G. Hancock.
19. Depositions of P. J. Pillans and exhibits therewith.
20. Deposition of James Craik and exhibits therewith.
21. Deposition of R. T. Birchett and exhibits therewith.
22. Deposition of Theodore S. Garnett and exhibits therewith.
23. Deposition of C. Duvall and exhibits therewith.
24. Deposition of J. Stoddard Johnson and exhibits therewith.
25. Deposition of Thos. H. Taylor and exhibits therewith.
26. Deposition of De Cordova.
27. Deposition of Lawrence.
28. Deposition of Spence.
29. Deposition of B. J. Chambers.
30. Papers marked "P," Nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9, filed with the deposition of George W. Paschal.

642 And the following papers and depositions were produced and read on the hearing by the defendant:

1. Deposition of John A. Harlan.
2. Deposition of R. A. Terrell.
3. Deposition of H. W. Young.
4. Deposition of P. P. Martin.
5. Deposition of J. M. Crockett.
6. Deposition of J. M. Riggs.
7. Deposition of J. F. Crosby.
8. Transcript of record, &c., from District Court of Navarro Dist. Court Texas.

The clerk will enter this of record as of 16th January, 1882.

DON A. PARDEE,
Judge.

643 And afterward, to wit, on the 18th day of January, 1882, there was filed in this cause the following agreement, endorsed: "No. 98, Chancery. Wm. Preston vs. Wm. C. Walsh. Filed Jan'y 18th, 1882. M. Hopkins, cl'k; by Sam Hopkins, dep'y."

In the Circuit Court of U. S. for the Fifth Circuit, District of Western Texas, at Austin. In Equity.

Preston
v.
Walsh. } No. 98. Stipulation.

It is stipulated and agreed by the parties, by counsel and with leave of the court, that exceptions to depositions and documents and parts of depositions, except as to mere matters of form, such matters

having been waived by prior agreement, and motions to exclude the same from the record or from consideration on the hearing, may be embodied in a single paper by such party with like effect as though severally and separately made as to each—the object being to shorten the record and facilitate the trial—and all such exceptions and motions it is agreed were made at the proper time.

Jan'y 18th, 1882.

PRESTON, WEST, BROWN,
For Compl't.

SAM A. WILLSON,
PEELER & MAXEY,
For Def't.

644 And afterward, to wit, on the 14th day of January, 1882, the complainant filed his exceptions to depositions, endorsed, to wit: "98, Preston vs. Walsh. Compl't's exceptions to depositions and m. to exclude. Filed January 14th, 1882. M. Hopkins, cl'k; by Sam Hopkins, d'y,"—in words as follows, viz:

In the Circuit Court of the U. S. for the Fifth Circuit, Western District of Texas, at Austin.

Wm. Preston
No. 98. *v.* } In Equity.
Wm. C. Walsh.

The complainant, Wm. Preston, in whose name this cause has been revived, now comes and files exceptions to certain depositions now by the defendant offered to be read in evidence; which said exceptions are as follows, to wit:

To the deposition of the witness J. M. Riggs, as follows, to wit:

1st Exception.—To so much of the said witness's answer to the 6th interrogatory as assumes to state that there was a suit pending, or to state the nature of such suit, or the time of its institution, or when it was disposed of, or who gained such suit, or how or in what terms any judgment in such suit was entered, because the same witness in his answer to the next interrogatory (7th) discloses the fact that there were made out by him transcripts of the record of said alleged suit, and that one of said transcripts was made out for
645 the Attorney-General of the State of Texas, and the subsequent loss or destruction of such transcript is not averred or proved, and such transcript is the best evidence of the facts alleged, and the parol proof offered is incompetent and inadmissible.

2d Exception.—And to so much of said witness's answer to the 7th interrogatory as assumes to say that the cause therein spoken of was appealed to the Supreme Court; for the same reason as in the last above exception is given.

3d Exception.—And to so much of said witness's answer to the 8th interrogatory as assumes to state what judge presided at said alleged trial, and that it was or was not a jury trial; for the same reason as in the first exception hereinabove is given.

4th Exception.—And to so much of said witness's answer to the 9th interrogatory as assumes to state what was averred or denied in said suit, or what issue was therein made, or that evidence was therein introduced; for the same reason as in the first exception hereinabove is given.

5th Exception.—And to so much of said witness's answer to the 10th interrogatory as assumes to state either directly or by adoption of, or reference to, the witness's answer to the 6th interrogatory what was the result of the trial of the suit spoken of; for the same reason as is in the 1st exception hereinbefore given.

6th Exception.—And to the said witness's answer to the 12th interrogatory, because it is hearsay and incompetent.

7th Exception.—And to the said witness's answer to the 14th interrogatory, because it is incompetent.

646 8th Exception.—And to the said witness's answer to the 15th interrogatory, because it is irrelevant and incompetent.

9th Exception.—And to the said witness's answer to the 16th interrogatory, because it is irrelevant and incompetent.

10th Exception.—And to the said witness's answer to the 17th interrogatory, because it is irrelevant and incompetent.

11th Exception.—And to the said witness's answer to the 18th interrogatory, because it is irrelevant and incompetent.

12th Exception.—And to the said witness's answer to the 19th interrogatory, because it is irrelevant and incompetent.

13th Exception.—And to the said witness's answer to the 20th interrogatory, because it is irrelevant and incompetent.

To the deposition of J. F. Crosby, as follows:

Exception 1.—To so much and such parts of the answers of said witness to the 4th, 5th, 7th, 8th, 9th, 10th interrogatories as assume to speak of the trial of the alleged cause in Navarro county, or to give the nature and substance of the proceedings, or of the proof or the result of such trial, or of the judgment, if any, or of the suppositions or opinions of the witness as to who were counsel in the case, because the defendant has already shown by his witness Riggs that a complete transcript of the record of such suit was made out
647 by him as clerk, and the loss or destruction of such transcript is not averred or proved; and such transcript is the best and

only admissible evidence, and because such testimony is incompetent.

To the deposition of J. A. Harlan, as follows, to wit:

Exception 1.—To each and every part and to every question and answer in said deposition contained, because of irrelevancy and incompetency.

To the deposition of R. A. Terrell, as follows, to wit:

Exception 1.—To so much of said witnesses' answer to the 12th interrogatory as assumes to state what was the general understanding of the people as to whether Mercer's grant had become forfeit, because such testimony is incompetent.

To the deposition of John M. Crockett, as follows, to wit:

Exception 1.—To the 14th interrogatory and said witnesses' answer thereto, so far as the general public opinion concerning the compliance by Mercer with the terms of his grant is inquired about, and so far as any opinion of settlers and others is given, because the same is irrelevant and incompetent.

Exception 2.—And to the 15th interrogatory and said witnesses' answer thereto, because the same is incompetent and irrelevant.

Exception 3.—And to the 17th interrogatory and said witnesses' answer thereto, because it is irrelevant and incompetent.

648 To the deposition of H. W. Young, as follows, to wit:

Exception 1.—To each and every part of said witnesses' answers to the interrogatories propounded by defendant, because the same are and each is irrelevant and incompetent.

To the deposition of P. P. Martin, as follows, to wit:

Exception 1.—To each and every part of said witnesses' answers to the interrogatories propounded by defendant, because the same are and each is irrelevant and incompetent.

To the deposition of J. M. Crockett, as follows, to wit:

1st Exception.—To the 14th interrogatory and said witnesses' answer thereto, because the same is incompetent as evidence in this cause and is irrelevant.

2nd Exception.—And to the 15th interrogatory and to the answer of the said witness thereto, because the same is incompetent and irrelevant.

3rd Exception.—And to the 17th interrogatory and to the answer of the witness thereto, because the same is incompetent and irrelevant.

And to the introduction in evidence, or the consideration by the court on the hearing, of the document offered in evidence by

649 defendant, purporting to be a transcript of a record of the District Court of Navarro county, Texas, of a suit wherein A. C. Horton, acting governor, &c., was plaintiff, and Charles Fenton Mercer was defendant, and moved to reject and exclude the same.

And the complainant prayed the court to sustain each and every the said exceptions. And further and at the same time complainant moved the court to suppress and exclude from the record each and every the said deposition and parts of depositions so excepted to, and that the same be not read on the hearing nor considered by the court.

WEST,
PRESTON,
BROWN,
For Compl't.

The above and foregoing objections were made in due time, and presented to the court, and the motion to exclude, together with said objections, for the action of the court, and the same were then overruled, and the said testimony and documents objected admitted in evidence on defendant's behalf.

In open court, this 14th January, 1882.

DON A. PARDEE,
Judge.

650 And afterwards, to wit, on the 14th day of January, 1882, defendant filed his objections to complainant's testimony, endorsed, to wit: "Filed January 14th, 1882. M. Hopkins, clerk. By Sam. Hopkins, deputy," as follows:

In Circuit Court of U. S., Western District of Texas, at Austin.

Geo. Hancock, complainant,
v.
J. J. Groos, Comm'r, &c., defendant. } No. 93. In Ch'y.

And now comes the defendant in the above-entitled cause and moves the court to suppress and exclude as evidence certain depositions and answers and parts of answers of complainant's witnesses to interrogatories as hereinafter stated, and makes certain objections to the admissibility and use as evidence of certain documentary evidence as hereinafter stated, viz:

1st. Defendant objects to the answer of the witness Theodore S. Garnett to the second direct interrogatory propounded to him, in so far as the same speaks about the character and biography of Charles F. Mercer, and about the will of said Mercer, because said portion of said answer is not responsive to the interrogatory, and is irrelevant and immaterial.

2nd. Defendant objects to the answer of said witness Garnett to

the 4th interrogatory, in so far as it states what he was told or informed by Anderson, Rowlett, and Pillan about their being
651 obstructed in making surveys for Mercer, because said portion of said answer is hearsay and irrelevant.

3rd. Defendant objects to the answer of said witness Garnett to the 6th direct interrogatory in so far as it speaks about lists of colonists handed him by Mercer's agents and what said lists showed as to the number of colonists, because said lists being in writing would be the best evidence, and their absence has not been accounted for; but, on the contrary, said lists were delivered as said witness states to Charles F. Mercer.

4th. Defendant objects to the answer of said witness Garnett to the 8th direct interrogatory, because the same is hearsay; and defendant objects to the exhibit marked "C" and made a part of said answer, the same being a letter written by said witness to George Hancock of date Nov. 24, 1868, because said letter or exhibit is irrelevant, immaterial, and not evidence for any purpose in this case.

5th. Defendant objects to the answer of said witness to the 3d cross-interrogatory, in so far as the same states what he was informed by Anderson, Rowlett, and Pillan, because the same is hearsay.

6th. Defendant objects to the answer of the witness Richard S. Burchett to the second direct interrogatory, and in so far as said witness states his opinion of the character of said Mercer, because the said matters are not responsive to said interrogatory, and are irrelevant and immaterial.

652 7th. Defendant objects to the answer of said witness Burchett to the 5th direct interrogatory, in so far as it states about the exhibit marked B No. 1, and also to said exhibit, because said answer and exhibit are irrelevant and immaterial.

8th. Defendant objects to the answer of said witness Burchett to direct interrogatory 8th, in so far as the same relates to exhibit marked B No. 2 made part of said answer, B No. 3, B No. 4, B No. 5, B No. 6, No. 7, and B No. 8; and also objects to each of the above-named exhibits, because the said answer and exhibits are irrelevant, immaterial, and not evidence for any purpose in this case.

9th. Defendant objects to the answer of said witness Burchett to cross-interrogatory 1, in so far as it states what Mercer informed him, and in so far as it states the faith that witness had in the Mercer contract, and in so far as it states that he had seen a writing in which Mercer admitted that he had sold his interest in the contract to Hancock, and in so far as it states the pecuniary circumstances of Mercer and the obtaining a pension for Mercer and the visit of Mercer to Europe, because the same is irrelevant, immaterial, and not admissible evidence in this case for any purpose, and is not responsive to said cross-interrogatory.

10th. Defendant objects to the answer of said witness Burchett to cross-interrogatory 3d, in so far as it states what he thought about the justice of the Mercer claim, because the opinion, belief, or faith of said witness is irrelevant, immaterial, and was not called for by said cross-interrogatory.

653 11th. Defendant objects to the answers of the witness P. J. Pillans to direct interrogatories 8th and 9th, in so far as the same speak about threats of violence or indignation meetings against Mercer and his employés, because said matters in said answers contained are irrelevant and immaterial.

12th. Defendant objects to the answer of said witness Pillans to direct interrogatory 15th, in so far as he states what one Taylor told him, because the same is hearsay.

13th. Defendant objects to the answer of said witness Pillans to the 19th direct interrogatory, in so far as he files a letter marked "P. J. Pillans," and also objects to said letter and report, because said letter and report were not called for by said interrogatory, and are irrelevant, immaterial, and not evidence in this case for any purpose.

14th. Defendant objects to the answer of the witness Claudius Duval to direct interrogatory 10th, in so far as it speaks about exhibits marked "C. D. No. 4," "C. D. No. 5," and also objects to said exhibits, because the said answer and exhibits are irrelevant, immaterial, and not evidence in this case for any purpose.

15th. Defendant objects to the answer of witness Thomas H. Taylor to direct interrogatory 4th, in so far as it makes a letter marked exhibit "A No. 1" a part of said answer, and also objects to such exhibit, because said portion of said answer and said exhibit are irrelevant, immaterial, and not evidence in this case for any purpose.

16th. Defendant objects to the answsr of the witness J. S. Johnson to the 1st direct interrogatory, in so far as it gives a biography of himself, because his biography is irrelevant and immaterial,
654 and not called for by the interrogatory.

17th. Defendant objects to the answer of the witness James Craik to direct interrogatory 2d, in so far as it refers to and files as part thereof exhibits marked "J. C. No. 1," "J. C. No. 2," and "J. C. No. 3," and objects to said exhibits, because the said portion of said answer and the said exhibits are irrelevant, immaterial, and not evidence in this case for any purpose.

18th. Defendant objects to the reading in evidence of the paper marked exhibit "T," filed with bill of revivor and supplement April 12, 1879, purporting to be the last will and testament of George Hancock, dec'd. Because: 1st. The said instrument was never probated in the State of Texas. 2d. Because the said instrument

confers upon complainant, Wm. Preston, no right to prosecute this bill. 3d. Because the said Wm. Preston can take no right or interest in and under the contract upon which this suit is based under said pretended will.

19th. Defendant objects to the paper marked "E," filed herein March 6, 1875, purporting to be a certified copy of a map of Mercer's Colony. 1st. Because said paper is not certified to by the proper officer. 2d. Because said paper is not a copy of a public archive. 3d. Because said paper is immaterial, irrelevant, and is not admissible as evidence for any purpose.

655 20th. Defendant objects to the paper filed herein and marked "I," purporting to be a certified copy of a memorial by George Hancock to the Legislature of Texas, because said paper is irrelevant and immaterial and not evidence for any purpose.

21st. Defendant objects to the letter signed Thos. H. Duvall, addressed to Burchett of date Feb'y 22d, 1854, because the same is irrelevant and immaterial and not evidence for any purpose.

22d. Defendant objects to the letter of Geo. W. Paschal to Geo. Hancock of date 14th June, 1854, because the same is irrelevant and immaterial.

23d. Defendant objects to the paper marked "Exhibit R," and filed with the bill of revivor and supplement April 12, 1879, because the same is irrelevant, immaterial, and not evidence for any purpose.

24th. Defendant objects to the paper marked "D" and filed herein March 6, 1875, the same being a certified copy of the report of J. M. Crockett, Com'r, &c., because said paper is irrelevant and immaterial.

25th. Defendant objects to the paper marked "P No. 4," which is a receipt signed Allen & Hale, by W. G. Hale, because the same is irrelevant and immaterial.

26th. Defendant objects to the paper marked "P No. 1," which is a contract between Geo. Hancock and Paschal & Wickes, because said paper is irrelevant, immaterial, and not evidence for any purpose.

SAM. A. WILLSON,
PEELER & MAXEY,
Solicitors for Def't.

656 The above and foregoing objections were made in due time and presented to the court for its action, and the same were overruled and the testimony and documents objected to admitted in evidence in complainant's behalf. In open court this the 14th day of January, A. D. 1882.

DON A. PARDEE,
U. S. Circuit Judge.

And afterwards, to wit, on the 25th day of January, 1882, the following decree was rendered in said cause and filed therein, indorsed, to wit: "No. 98 Ch'y. Wm. M. Preston *v.* W. C. Walsh, Land Com'r, &c., in equity. Filed January 25, 1882. M. Hopkins, cl'k; by Sam Hopkins, deputy."

In the Circuit Court of the U. S. for the Fifth Circuit and Western District of Texas, at Austin. In Equity.

William Preston, complainant,
v.
W. C. Walsh, Commissioner of the General Land Office, defendant. } No. 98. Decree.

657 This cause came on to be heard at this term on the 25th day of January, 1882, and was argued by counsel. And thereupon, upon consideration thereof, it was and now is ordered, adjudged, and decreed as follows, namely:

First. That the complainant's allegations are found to be true and supported by the proof, and that the order and writ of injunction heretofore granted and issued in this cause is hereby made perpetual, and the defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and all and every his successors in office, and all his clerks, draftsmen, subordinates, agents, servants, and employees, and all officers or agents, subordinates to him, the said defendant, or to any of his successors in office, or in any manner under the direction, supervision, or control of him, or of any of his successors in office, be and hereby is and are restrained, prohibited, and forever enjoined from issuing or delivering, or permitting to be issued or delivered to any person or persons, or to any corporation, any certificate or certificates, patent or patents, plat or plats, for any land or lands, within the boundaries of Mercer's Colony, as set forth in the bill of complaint and the exhibits therewith filed; and from any and all interference with, or infringement of, or upon the land grant or land reservation known as Mercer's Colony, and from doing or causing to be done any act or thing whereby there may issue any patent, certificate, plat or grant of any land within
658 the boundaries of said Mercer's Colony, as defined and set forth in the bill of complaint and the exhibits therewith filed, and as set forth in the contract made on the 29th of January, 1844, by and between the Republic of Texas, by Sam Houston, president thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas,—except to the complainant, William Preston, as chief agent of the Texas Association, or his successors or assigns, or to such person or persons as he or his successors may in writing direct.

And it is further ordered, adjudged, and decreed that the defendant, William C. Walsh, Commissioner of the General Land Office of the State of Texas, and each and every his successors in office, and all his or their servants, employees, agents, clerks, draftsmen, surveyors, deputies, and subordinates, each and every one be, and the same are enjoined, restrained, and prohibited from hindering, obstructing, preventing, or delaying the said William Preston, his agents, attorneys, employees, or the successor or assigns of said Preston, and their agents, attorneys, or employees in the surveying, selecting, platting, recording, entering, or claiming any and all lands lying within the limits and boundaries of the so-called Mercer's Colony, as set forth in the bill of complainant and the exhibits therewith filed, and the said defendant and his successors in office,
659 and his and their agents and subordinates are enjoined from hindering, obstructing, preventing, or delaying the said Preston or his successor or assigns, or the Texas Land Association, from performing and completing and perfecting all and singular the several conditions, duties, obligations, and acts devolving upon the said Preston or said association under the terms and stipulations of the colonization contract set forth in the bill of complainant in this cause, and in the exhibits filed with the said bill of complainant: *Provided*, That this decree and the injunction herein shall not be held nor intended to affect any lands appropriated or set apart by the act of congress of the Republic of Texas, entitled "An act appropriating certain lands for the establishment of a general system of education," approved January 26th, 1839, and which lands were legally located, surveyed, and appropriated for a State university prior to Jan'y 29th, 1844, the date of the Mercer colonization contract.

And it is further ordered and adjudged that the defendant do pay all the costs herein incurred, the clerk to tax the same, and that proper process issue therefor.

Decree rendered Jan'y 25th, 1882, and signed Jan'y 26th, 1882.

DON A. PARDEE,
Judge.

And afterwards, to wit, on the 3rd day of February, A.
660 D. 1882, the defendant Walsh filed his application for allowance of appeal, as follows, to wit:

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin, January Term, 1882.

No. 98. William Preston *v.* William C. Walsh, Commissioner of the General Land Office of Texas. } In Equity.

The defendant in the above entitled cause, conceiving himself aggrieved by the final decree rendered in said cause, January 25, 1882,

and signed and entered of record therein on the 26th day of January, A. D. 1882, doth hereby in open court on this the day of February, A. D. 1882, appeal therefrom to the Supreme Court of the United States, and prays that this his appeal may be allowed and that a transcript of the record, proceedings, and evidence in the said cause, duly authenticated, may be sent to the said Supreme Court.

PEELER & MAXEY,
Solicitors for Defendant.

And thereupon, upon considering the same, it was ordered
661 by the court as follows, to wit:

It appearing to the court that the foregoing application is in due form, and that the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and the solicitors of complainant being now here present in court, having notice of the said application, the said appeal as prayed is granted and allowed; and the security to be given by the appellant that he will prosecute his appeal to effect, and answer all costs if he shall fail to make good his plea, is fixed at $1,000; and the bond now here tendered by the appellant in the sum aforesaid, bearing date February , 1882, is now here taken and approved, such taking and approval being endorsed thereon by the Hon. E. B. Turner, judge, &c.

The clerk will enter the application for appeal and the foregoing order of record this the 3rd day of February, A. D. 1882.

E. B. TURNER,
Judge.

And at the same time, to wit, on the 3rd day of February, A. D. 1882, the defendant Walsh filed his bond for appeal, endorsed, to wit: "98 Chancery. Preston *vs.* Walsh, &c. Filed Feb. 3, 1882. M. Hopkins, clerk. Bond for appeal," as follows, to wit:

662 In the Supreme Court of the United States.

William Preston, complainant,
No. 98. *v.*
William C. Walsh, Commissioner of the General Land Office of the State of Texas, defendant. } In Equity.

Know all men by these presents, that we, William C. Walsh, defendant in the above entitled cause, and Frank Hamilton and James R. Johnson, are held and firmly bound unto William Preston, complainant in the above entitled suit, in the sum of one thousand ($1,000) dollars to be paid to the said William Preston, his executors or administrators, or to his successor or successors, as trustee or trustees of the Texas Association, to which payment well and truly to be made

we bind ourselves and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and signed and dated this the 3rd day of February, A. D. 1882. Whereas the above-named William C. Walsh, defendant in above entitled cause, hath taken an appeal to the Supreme Court of the United States to reverse the final decree, rendered in said cause on January 25, A. D. 1882, and signed and entered of record on the 26 day of January, A. D. 1882, in the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin: Now, therefore, the condition of this obligation is such that if the above-named William C. Walsh, defendant as aforesaid, shall prosecute his appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full
663 force and virtue.

WILLIAM C. WALSH.
FRANK HAMILTON.
JAS. R. JOHNSON.

Sealed and delivered in the presence of—
A. J. PEELER.

Taken and approved by me in open court this the 3rd day of February, A. D. 1882.

E. B. TURNER,
U. S. Judge.

664 Opinion of Judge W. B. Woods upon demurrer and motion for injunction pendente lite, filed on April 19, 1879, and endorsed, to wit: "No. 98, chancery. Geo. Hancock's devisee *v.* Wm. C. Walsh, Comm'r Gen'l Land Office, Texas. Filed April 19, 1879. M. Hopkins, clerk," as follows, to wit:

U. S. Circuit Court, Western District of Texas.

George Hancock's Devisee
v.
Wm. C. Walsh, Commissioner of the General Land Office of Texas.

In Equity. Heard on demurrer to the bill, and on motion for injunction *pendente lite.*

The original bill was filed on March 6, 1875, by George Hancock, a citizen of Kentucky, against J. J. Groos, who at that time was Commissioner of the General Land Office of the State of Texas.

After the filing of the original bill, to wit: on August 27, 1875, Hancock, the complainant, died, and the suit was revived in the name of William Preston, his devisee, upon a bill of revivor filed January 26, 1876.

Afterwards Groos, the defendant, died, and on April 12, 1879, a bill of revivor and supplement was filed against William C.
665 Walsh, his successor in office, who entered his appearance and filed his demurrer to the original and supplemental bills.

The case made by the original and supplemental bills was as follows:

The Republic of Texas, after establishing her independence, adopted substantially the colonial policy, commenced in 1825, by the Government of Mexico, to induce the settlement and colonization of its lands in Coahuila and Texas. Several acts of the Congress of the Republic were passed to carry out this policy. By authority of these acts thirteen colonial contracts were entered into by the Republic of Texas, through the agency of its President; with various colonial contractors. Among these contracts was one made on January 29, 1844, between Samuel Houston, President of the Republic of Texas, and Charles Fenton Mercer, a citizen of Florida, and such associates as he should choose, the original of which is on file in the State Department of the State of Texas. By the terms of this contract it was stipulated that Mercer should, within five years from the date of the contract, settle upon so much of the public domain of Texas as was designated in the contract as Mercer's Colony, and described by metes and bounds, as many emigrant families as he and his associates could induce to move thereon, at the rate of one family for every section of one square mile of vacant and unappropriated land, with the proviso that at least one hundred families should be settled on said lands during every year of the term of five years, for which the contract was to run.

In consideration of the performance by Mercer and his associates of their part of the contract, the Republic of Texas agreed to convey to Mercer and his associates one section of 640 acres of land for every family that they should introduce and settle upon said lands, and to make a full and perfect title therefor to him and his associates as soon as they should exhibit to the proper officer the evidence that said families had been settled on the lands embraced within the limits of the colony, and as a premium and recompense for
666 their labor and expenditure in the performance of the contract, the Republic of Texas agreed and covenanted to give, grant, and convey to Mercer and his associates, or their legal representatives, one section of six hundred and forty acres or two half sections of three hundred and twenty acres each for every one hundred families introduced and settled by them on said lands in pursuance of the contract. Mercer at once entered into possession of said lands and surveyed and occupied the same by his agents and colonists in conformity with the provisions of the contract, and did manage and control the same as proprietor thereof; and in order to perform the contract on his part, and as authorized by the contract itself, at once organized a joint stock company, which was called the "Texas Association," composed of many men of wealth and character, and he and his associates in said company, in compliance with the stipu-

lations of their contract, gave their time, labor, and services to establish said colony, and did introduce and settle upon said lands not less than one hundred families in each and every year of the five years for which said contract was to run, and well and truly performed all the covenants by them to be performed under the terms of the contract, and for the accomplishment of these ends they subscribed and paid money exceeding twenty thousand dollars. Twelve hundred and fifty-six families were in fact introduced and settled within the limits of the said colony within five years after the date of the contract by Mercer and his associates, which under the terms of the contract would have entitled them to thirteen hundred and fifty-six sections of land of six hundred and forty acres each.

On January 29, 1849, the date at which said term of five years expired, Mercer and his associates offered to exhibit to the Commissioner of the General Land Office of Texas proof of the facts above recited, to wit, of the introduction and settlement of said families, and did in fact make a report, which is now on file in the General Land Office of Texas, giving the number and names of the colonists and families introduced and settled by him within the limits of the colony, verified by affidavit and with the names of the required wit-
667 nesses, attesting and verifying all the facts therein stated and showing the strict performance by Mercer and his associates of the covenants in said contract by them to be performed.

The contract between Mercer and the Republic of Texas further provided that lands lying within the limits of the Mercer Colony which had not been legally located prior to the date of the contract should be held subject to be settled by Mercer and his associates for the period of five years, and should be set apart from the public domain and kept free from all future locations and claims, to be colonized in the manner specified in the contract, for the use and benefit of Mercer and his associates. At the date of said contract the Republic of Texas was seized, in sovereign demesne, of all the lands within the limits of the grant to Mercer, and by her statutes held out the promise that in all contracts for colonization an immediate equitable title should vest in the contractor, subject to be divested only upon the non-performance by him of the conditions annexed to the grant. The statutes and contract taken together created a trust whereby the State, retaining the legal title, empowered and required her proper officers to convey the legal title to the contractor as soon as evidence was produced of the performance of the contract by him. Yet, notwithstanding the premises, the former Commissioner of the General Land Office of Texas proceeded to issue certificates for lands within the colony of Mercer, to all persons holding general certificates of locations, and to issue patents therefor, and the defendant Walsh continues to issue patents upon surveys made within the limits of the colony, in violation of said contract.

By reason of the performance by Mercer and his associates of the terms of the said contract, they became entitled to have and receive a full and perfect title to twelve hundred and fifty-six sections of

land within the boundaries of said colony, and also one hundred and twenty sections of premium lands, being ten sections for every hundred families introduced by them and settled in said col-
668 ony. Full evidence was adduced and is of record in the archives of the General Land Office of the State of Texas that 1,256 families, claiming and holding under said Mercer, were introduced and settled by him upon land lying within the limits of said colony, according to the terms of said contract.

The State of Texas has recognized the constitutionality and binding force of said contract by the decisions of her Supreme Court, and by the issue to the colonists under Mercer of twelve hundred and fifty-six patents for land in said colony, whereby the title to said twelve hundred and fifty-six sections was conveyed to the said colonists.

There are more than one million acres of land lying within the limits of Mercer's Colony which have never been located and patented, but remain vacant, and are subject to the terms of the contract between the Republic of Texas and Mercer, and should in equity be reserved for the fulfillment of said contract; and under the statutes of the State of Texas it is the duty of the Commissioner of the General Land Office to issue to complainant and his associates certificates for the lands to which the said contract entitled them.

The joint stock company known as the "Texas Association," which was formed under said contract between the Republic of Texas and the said Mercer, had authority under the terms of said contract to name one or more trustees to act for said association, and said association did appoint the said Mercer sole trustee, with full authority and power to bind the association and act for it in the premises.

Mercer accepted the said trust, and continued to discharge the duties of trustee until the year 1852, when he sold and assigned his interest in the property of the association to said George Hancock, who was thereupon duly appointed and chosen trustee and chief agent of the association in the place of Mercer, and invested
669 with all the powers of such trustee and agent, and said Hancock continued to act as such trustee and agent up to the filing of the bill in this cause, and afterwards to the time of his death.

The said George Hancock, soon after the sale to him by Mercer of his interest in said contract, came to the State of Texas and found the rights of other colonial contractors under discussion in the Legislature and in litigation in the courts. He was advised that there would be an equitable adjustment of all colonial contracts, including that of Mercer, and was for that reason requested by his associates to await the action of the State and confide in its justice. He did so, and urged the claims of himself and associates under said contract upon the officers of the State. He was thus delayed till 1858, when the Supreme Court of Texas decided in favor of the constitutionality and validity of said contract between the Republic of Texas and Mercer. Soon after the war of rebellion broke out, which made

it impossible for him during its continuance to assert his rights. Recently he has been constantly petitioning the Legislature of the State for redress, but has never received any relief.

After the appointment of said Walsh as Commissioner of the General Land Office of Texas, the present complainant gave him notice in writing of the rights of the Texas Association and of complainant, and requested him not to issue any land certificates or patents for lands within the limits of the Mercer Colony. Said Walsh refused to comply with such request, and threatened to continue, and has continued, and still continues to issue certificates and patents for lands within the Mercer Colony to persons not claiming under, or in privity with, the contract of Mercer.

At the same time, the present complainant demanded of defendant Walsh, Commissioner of the General Land Office, that he should issue to complainant, as chief agent of the Texas Association,
670 certificates for thirteen hundred and seventy-six sections of land, according to the terms of said contract; but Walsh refused, and still refuses to comply with such demand and request, and to deliver to complainant any land certificates whatever. No land certificates or patent for land has ever been issued, either to Mercer, Hancock, the Texas Association, or the complainant, for lands to which they were entitled under said contract.

George Hancock, the successor as trustee and chief agent of the Texas Association of the said Charles Fenton Mercer, by his last will and testament appointed the present complainant, William Preston, to act as trustee and chief agent of the Texas Association; to maintain and prosecute its claims under said act, or any suit based thereon; to revive the same; and to do all things which the said Hancock under the said agreement of association and contract might do; and did devise and bequeath to said William Preston all his right, title, and interest in and to the estate, stock, and property of said Texas Association. Complainant accepted said trust, and he is now chief agent and trustee of the Texas Association, and has been and is recognized as such by the association and the members thereof.

In the convention which assembled July 4, 1845, to frame a constitution for the State of Texas, preparatory to her admission as one of the United States of America, attempts were made to declare colonial grants and contracts, including the Mercer contract, to be null and void *ab initio*. All such propositions were defeated, and no clause making such declaration was inserted in the constitution; but an ordinance adopted by the convention declared that the legislature should provide for proceedings in the courts by the Attorney-General or district attorneys to test the constitutionality, legality, and good faith of all colonization contracts, including Mercer's, entered into by the Republic of Texas, and to decide whether the condi-
671 tions of such contracts had been performed by the contractors.

The Legislature of Texas has never made any such provi-

sion of law as contemplated by the ordinance of 1845, although Mercer and Hancock and the Texas Association have made repeated applications for the passage of such an act whereby they could assert and vindicate their rights in the courts.

All colonial contracts made by President Houston for the Republic of Texas, except the contract with Mercer, have been adjusted and settled by the State of Texas, either by agreement of the contractors with the State or by judicial proceedings authorized by special legislation for the particular case.

The joint resolution of the Congress of the United States, providing for the admission of Texas as one of the States of the Union, declared that the State of Texas should retain all the unappropriated lands within her borders to be applied to the payment of the debts and liabilities of the Republic of Texas, and the convention of 1845, which framed a constitution for the State of Texas, recognized and, in effect, admitted that the contract of Mercer was one of the liabilities of the Republic.

On February 3, 1845, the Republic of Texas by legislative act required Mercer and his associates to have the lines of their colony actually surveyed and marked by the first day of April, 1845, and notwithstanding the great difficulty and expense of making such surveys within so short a time, the same was accomplished and marked before the time limited by the act of Congress.

Neither Mercer, nor his associates, nor Hancock, nor the present complainant, have ever abandoned or failed to assert their rights under said contract, but have continuously set up the same, openly and publicly, and in all ways open to them have asserted the validity of said contract and the full performance of its conditions by said Mercer and his associates.

672 Such were in substance the averments of the original and supplemental bills.

The original bill prayed for an injunction restraining the defendant and his successors in the office of Commissioner of the General Land Office of Texas from allowing any location or survey of lands lying within the limits of the Mercer Colony not yet patented, and from issuing any patent or grant of land within said limits except to complainant or the Texas Association, and from doing, or suffering to be done, any act whereby such lands may be located, surveyed, or patented to any other person or persons except complainant, to be held by him in trust for the Texas Association. The bill also prayed general relief.

To the original and supplemental bills demurrers were filed on the following grounds:

1. Because the suit is in effect a suit against the State of Texas, and seeks to deprive the State of the right and power of disposing in her own way of her own public lands.

2. That if complainant is entitled to any relief it must be sought through the political department of the government of the State of Texas.

3. That the case made by the bill does not entitle the complainant to the relief prayed.

4. That the claim is barred by lapse of time.

5. That defendant is an executive officer of the State of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law.

6. The bill is not sworn to.

7. This court is without power to restrain or enjoin him, he being an executive officer of a sovereign State.

8. That the acts of defendant complained of in the bill involve the exercise of official discretion, and are not merely ministerial acts, and he cannot therefore be enjoined.

673 9. The bill shows that defendant cannot refrain from patenting the lands mentioned without violating an official duty.

10. The bill shows that no injury can come to the complainant pending the suit.

At the hearing of the demurrer, counsel for complainant moved for an injunction *pendente lite* according to the prayer of the bill. The demurrer and motion were argued at the same time. Messrs. William Preston and John Mason Brown; John Hancock, C. S. West, and W. F. North, for complainant.

Mr. George McCormick, Attorney-General of Texas, for defendant.

WOODS, CIRCUIT JUDGE.

This is not a suit against the State of Texas. In the case of Osborn *v.* The Bank of the United States, 9 Wheat., 738, it was held that "in deciding who are parties to the suit, the court will not look beyond the record; that making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. And that a State can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case."

The doctrine of this case was approved in the later case of Davis *v.* Gray, 16 Wall., 203; see also Dodge *v.* Woolsey, 18 How., 331; The State Bank of Ohio *v.* Knoop, 16 How., 369; Ohio Life and Trust Company *v.* Dibolt, 16 How., 432; The Mechanics & Traders' Bank *v.* Dibolt, 18 How., 380; and The Jefferson Branch Bank *v.* Skelly, 1 Black, 436.

This suit is brought not against the State, but against an officer of the State, who it is alleged, without the authority of any valid law of the State, is by an unwarranted assumption of power so

674 using his official position as to invade rights secured to complainant by the constitution and laws of the United States. This is the very case put by the Supreme Court of the United States in Osborn *v.* The Bank of the United States, *supra*, where it is decided that "a Circuit Court of the United States may enjoin a State officer from executing a State law in conflict with the con-

stitution or a statute of the United States, when such execution will violate the rights of complainant. To the same effect are the cases of David *v.* Grey, *supra*, and Board of Liquidation *v.* McComb, 2 Otto, 541.

It appears from the bill that Mercer concluded with the Republic of Texas a contract of colonization; that he performed its conditions; that rights have accrued to him and his associates; that their rights have been ascertained and fixed as to quantity and character; that he and his associates have a vested interest in the lands described in the contract; and that the State of Texas now holds the nominal legal title only, and that the defendant is violating his official duty, as land commissioner, by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates.

Is it within the power of the State of Texas to disregard the contract made by Mercer with the Republic of Texas? If it is not, then if the Commissioner of the General Land Office is invading the rights of Mercer or his successors under the contract, either within or without the apparent authority of the legislature, his acts should be restrained by this court.

The Supreme Court of Texas, in the case of Melton *v.* Cobb, 21 Texas, 530, has held that the contract of the Republic of Texas with Mercer was a valid contract. The court in that case declares the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was therefore binding upon the Republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an obligation upon the part of the Republic to convey the legal title to the lands as soon as the conditions had been performed. It was a liability of the Republic which held the title to lands which it had contracted to convey and for which the consideration had been paid in full. It was as complete and binding a liability as a sovereignty could assume.

675

And the debates in and action of the convention of 1845, convened to frame a constitution for the State of Texas, show that these colonial contracts, including Mercer's, were regarded as liabilities of the Republic. See Debates of the Convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.

Now, what is the relation of the State of Texas to this liability? By the first of the joint resolutions passed by the Congress of the United States for annexation of Texas to the United States, (5 Statutes at Large, 797,) it was declared that "Congress doth consent that the territory properly included within and rightly belonging to the Republic of Texas may be erected into a new State to be called the State of Texas, with a republican form of government adopted by the people of said Republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of the Union."

The second of said joint resolutions declared "That the foregoing

3. That the case made by the bill does not entitle the complainant to the relief prayed.

4. That the claim is barred by lapse of time.

5. That defendant is an executive officer of the State of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law.

6. The bill is not sworn to.

7. This court is without power to restrain or enjoin him, he being an executive officer of a sovereign State.

8. That the acts of defendant complained of in the bill involve the exercise of official discretion, and are not merely ministerial acts, and he cannot therefore be enjoined.

673 9. The bill shows that defendant cannot refrain from patenting the lands mentioned without violating an official duty.

10. The bill shows that no injury can come to the complainant pending the suit.

At the hearing of the demurrer, counsel for complainant moved for an injunction *pendente lite* according to the prayer of the bill. The demurrer and motion were argued at the same time. Messrs. William Preston and John Mason Brown; John Hancock, C. S. West, and W. F. North, for complainant.

Mr. George McCormick, Attorney-General of Texas, for defendant.

WOODS, CIRCUIT JUDGE.

This is not a suit against the State of Texas. In the case of Osborn *v.* The Bank of the United States, 9 Wheat., 738, it was held that "in deciding who are parties to the suit, the court will not look beyond the record; that making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. And that a State can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case."

The doctrine of this case was approved in the later case of Davis *v.* Gray, 16 Wall., 203; see also Dodge *v.* Woolsey, 18 How., 331; The State Bank of Ohio *v.* Knoop, 16 How., 369; Ohio Life and Trust Company *v.* Dibolt, 16 How., 432; The Mechanics & Traders' Bank *v.* Dibolt, 18 How., 380; and The Jefferson Branch Bank *v.* Skelly, 1 Black, 436.

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The second of said joint resolutions declared "That the foregoing

assent of Congress is given upon the following conditions, to wit: * * * * * Second, said State when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * * * and all other means pertaining to the public defense belonging to the Republic of Texas, shall retain all public funds, debts, &c., * * * * * and all the vacant and unappropriated lands lying within its limits, to be applied to
676 the payment of the debts and liabilities of the Republic of Texas, and the residue of said lands after discharing said debts and liabilities to be disposed of as the State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States."

These resolutions, on July 4, 1845, were accepted by an ordinance which passed the convention with but one dissenting vote, which was signed by every member of the convention, and which, after reciting the resolutions, declared: "Now, in order to manifest the assent of the people of this republic, as required in the above-recited portions of said resolutions, we, the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare that we assent to and accept the proposal, conditions, and guarantees contained in the first and second resolutions of the Congress of the United States aforesaid." (Hartley's Digest, 44–47.)

On the faith of the acceptance of these resolutions Texas was admitted as a State into the Union of States.

Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions? It seems to me to be clear that it is not.

The passage of the resolutions by the Congress of the United States and their acceptance by the deputies of the people of Texas constituted either a treaty or a contract. It probably cannot be considered as a treaty because it was not made by the President, by and with the advice and consent of two-thirds of the Senators present, as prescribed by section 20, article 2, of the Constitution, unless the long acquiescence of all departments of the government gives it the force and effect of a treaty. Whether it be a treaty or a contract, it is alike within the clause of the Constitution of the United States which forbids a State from impairing the obligation of contracts. (Green v. Biddle, 8 Wheat., 92.) If it is to be con-
677 sidered a treaty, it is protected by the second clause of article VI of the Constitution of the United States, which declares: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

If this is a treaty, the Legislature of Texas can no more repeal or annul it than it can repeal or annul a clause in the Constitution of the United States.

If it is to be considered as a contract, it is equally beyond the

power of the legislature, for a State is as much forbidden by the Constitution from passing laws to impair the obligations of contracts made by herself as by other parties.

By no device that a State can resort to can she escape this constitutional prohibition. It is perfectly clear that she cannot authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the State of Texas may be enjoined from invading his rights by a disregard of the contract made by the State of Texas on the faith of which she was admitted as a State of the Union.

The State of Texas has never expressly repudiated the contract made with Mercer. On the contrary, it has been pronounced valid and binding by her supreme court, as we have seen in Melton *v.* Cobb, supra. The act of the Legislature of Texas of February 2, 1850, (Hartley's Digest, 7027,) is the only act to which we have been referred that gives authority to any one to issue certificates to be located within the Mercer Colony, and those were to be issued, not generally, but only to settlers in the colony who were entitled to lands under the Mercer contract, and not by the Commissioner of the General Land Office, but by a special commissioner appointed by the governor, who was required to hear proofs and determine what colonists were entitled to the lands. This is a recognition rather than a repudiation of the contract.

678 There is no act of the legislature of Texas directly imposing upon the Commissioner of the General Land Office the duty of issuing certificates for location within the Mercer Colony, and if there were, it would be null and void.

Nor have we been referred to, or have we been able to find, any act which clothes the Commissioner of the General Land Office with judicial or *quasi*-judicial functions in regard to the issue of certificates and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that, by reason of the facts stated in the bill, the State of Texas becomes a trustee for him and his associates, seems to be well taken.

A State may become a trustee. (Perry on Trusts, section 41.)

The contract between the Republic of Texas and Mercer was a grant of lands to Mercer upon a condition subsequent which, according to averments of the bill, was performed. The legal title remained in the republic, which thereby became a trustee for Mercer and his associates. (3 Washburn on Real Property, third edition, 525, *et seq.*)

On the execution of the contract, Mercer took a vested estate, defeasible only on the non-performance of the condition.

This trust imposed upon the Republic of Texas was not extinguished by the formation of the State of Texas and her annexation to the Union, but was imposed and fastened upon the State as the sovereign successor of the republic. (New Orleans *v.* United States,

10 Pet., 662; Smith *v.* United States, 10 Peters, 326; United States *v.* Arredondo, 6 Peters 691; Pollard's Heirs *v.* Kibbe, 14 Peters, 353.)

The State of Texas, therefore, is in the same plight, as re-
679 gards the rights of Mercer and his associates, as the Republic was, and holds the relation to them of trustee to *cestui que trust.* We have already seen that the State of Texas, by her own express consent, given in the most solemn manner, agreed to hold the public domain of the Republic and apply it to the extinguishment of the liabilities of the Republic. She therefore became a trustee for the parties to whom the Republic was liable, not only by operation of law, but also by her own express contract.

This is an express trust, which is defined to be a trust created by instruments that point out, directly and expressly, the property, persons, and purposes of the trust. (Perry on Trusts, section 24.) If the State were, therefore, a party to this suit, it would not be competent for her to set up lapse of time or any defense analogous to the statute of limitations to protect her from being called upon to execute the trust. For, as between trustee and *cestui que trust*, in the case of an express trust, such as this, the statute of limitations has no application and no length of time is a bar. (Perry on Trusts, section 836, and cases cited.)

Much less can an officer of the State who, according to the averments of the bill, is by his acts invading the rights of the beneficiaries of a trust assumed by the State, plead the lapse of time against the enforcement of the trust.

But even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the averments of the bill offer reasonable excuse for the dalay in bringing the suit, and it is the law of this State that, when such excuse is offered, the court will not apply the limitation. (McKin *v.* Williams, 48 Texas, 89.)

It is objected that the bill is not sworn to. The want of verification of the bill is not ground of demurrer. If the bill is not sworn to, the court will not allow an injunction to go, unless its averments are sustained by evidence. The laws of Congress, of the Republic, and of the State of Texas, and the facts of public history, of all of which the court takes judicial notice, the exhibits to the bill sufficiently establish its averments.

680 The foregoing discussion has covered all the grounds of demurrer, and in the opinion of this court none of the grounds are well taken.

This is not a suit against the State, nor does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which the complainant seeks to appropriate are not the lands of the State. The relief sought by the bill may be properly granted by a court of the United States, and the complainant is not compelled to seek his rights through the political department of the State government, to which he and his predecessors have, according to the bill, repeatedly appealed in vain.

The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorized the defendant to disregard the contract of the State is null and void, and, therefore, is not binding law. If the defendant is violating the provisions of a contract protected by the Constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of the State, and no claim that defendant is performing an official duty will avail.

The averments of the bill make a case of the highest equity, which imperatively demand the interference of this court to prevent irreparable injury to complainant and his associates. The complainant seeks to enforce an express trust which no lapse of time can render stale.

The case seems to run on all-fours with the case of Davis *v.* Gray, 16 Wall., *supra*, which went up from this district, and in which the Governor of the State and the Commissioner of the General Land Office were enjoined from issuing patents for lands within the territory granted by the State of Texas to the Memphis & El Paso Railroad Company.

The conclusion seems to be irresistible that the demurrer must be overruled, and that the injunction should go as prayed in the bill. And it is so ordered.

W. B. WOODS,
Judge.

681 I, Mathew Hopkins, clerk of the Circuit Court of the United States, Fifth Circuit, in and for the Western District of Texas, at Austin, certify that the foregoing 680 pages in writing contain a full and true transcript of the record, and the map of Mercer Colony on page 190½, and all the proceedings had, and of the opinion of Judge W. B. Woods as they appear of file and record in this court, in cause No. 98, entitled Wm. Preston *v.* Wm. C. Walsh, Com., &c., in equity.

In testimony whereof, I have hereunto set my hand and the impress of the seal of said court, at Austin, this 8 day of June, A. D. 1882.

[SEAL.] M. HOPKINS,
Clerk.

682 *Petition for Appeal by Compl't.*

In the Circuit Court of the United States for the Fifth Circuit, District of Western Texas, at Austin.

W. Preston, compl't,
vs.
W. C. Walsh, Commissioner General Land Office of the State of Texas, def't.

The above-named complainant, W. Preston, conceiving himself aggrieved by the final decree entered on the 26th day of January,

1882, in the above entitled cause, doth appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

HANCOCK & WEST,
JOHN MASON BROWN,
Solicitors for Compl't.

683 *Order granting Appeal to Compl't.*

In the Circuit Court of the United States for the Fifth Circuit, District of Western Texas, at Austin.

W. Preston, compl't,
v.
W. C. Wa'sh, Comm'r, &c., def't.

The complainant having in open court on this day prayed an appeal herein from the decree herein, on the 26 January, 1882, entered, it is now ordered that such appeal be and is granted him to the Supreme Court of the United States, on his executing a bond in the penal sum of $1,000 conditioned according to law. And it appearing from the statement of counsel for complainant and defendant, made in open court, that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, has already been sent by the defendant, on his appeal, to the Supreme Court, it is ordered that the further transcript, being the application for appeal by complainant and this order, and the citation on this appeal and return of service thereon, and bond for costs thereon, be duly authenticated and sent to said Supreme Court of the United States.

W. B. WOODS,
Judge.

684 In the Circuit Court of the U. S., Fifth Circuit, District of Western Texas, at Austin.

W. Preston, compl't,
vs.
W. C. Walsh, com'r, &c., def't.

The United States of America to W. C. Walsh, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the ..... Monday in October next, pursuant to an appeal prayed by complainant, W. Preston, in the Circuit Court of the United States for the 5th Circuit and Western District of Texas, and to him by the said court allowed and granted in a certain equity cause

wherein said Wm. Preston is complainant and you are defendant, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. B. Woods, Associate Justice of the Supreme Court of the United States, at Austin, Texas, this 10th day of June, 1882.

W. B. WOODS.

Service accepted.

WM. C. WALSH,
BY PEELER & MAXEY,
Solicitors.

June 10th, 1882.

685 In the Supreme Court of the United States.

William Preston, complainant,
v.
Commissioner of the Gen'l Land Office of the State of Texas, defendant. } In Equity.

Know all men by these presents, that we, William Preston, complainant in the above entitled cause, and John Mason Brown and Charles S. West are held and firmly bound unto Wm. C. Walsh, defendant in the above entitled suit, in the sum of one thousand ($1,000.00) dollars, to be paid to the said Wm. C. Walsh, his executors or administrators, or to his successor or successors in office. To which payment well and truly to be made we bind ourselves and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seal, and signed and dated this 10th day of June, 1882. Whereas the above named William Preston, compl't in above entitled cause, hath taken an appeal to the Supreme Court of the United States to reverse the final decree rendered in said cause on January 25th, A. D. 1882, and signed and entered of record on the 26th day of January, A. D. 1882, in the Circuit Court of the United States for the 5th circuit and western district of Texas, at Austin: Now, therefore, the condition of this obligation is such that if the above named William Preston, complainant as aforesaid, shall prosecute his appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

W. PRESTON.
C. S. WEST.
JOHN MASON BROWN.

Sealed and delivered in presence of—
M. HOPKINS, *Clerk.*

Taken and approved by me in open court this the 14th day of June, A. D. 1882.

E. B. TURNER,
686 *U. S. Judge.*

I, Mathew Hopkins, clerk of the Circuit Court of the United States in and for the western district of Texas, at Austin, certify that the five written foregoing pages contain a full and true transcript of the record of complainant's appeal in the case of Wm. Preston, complainant, *vs.* Wm. C. Walsh, &c., which, together with the transcript forwarded to clerk of Supreme Court United States on defendant's appeal, constitute a full and true transcript of the whole record in said cause.

In testimony whereof I have hereunto set my hand and seal of court, at Austin, this 12th day of June, A. D. 1882.

M. HOPKINS, *Clerk.*

OFFICE SUPREME COURT U.S.
FILED
FEB 27 1883
JAMES H. McKENNEY, Clerk.

To accompany brief and argument of William Preston in Walsh & Preston Supreme Court United States No 863

W. Preston

109-297

United States Circuit Court.

FIFTH CIRCUIT, WESTERN DISTRICT OF TEXAS; AT AUSTIN.

WILLIAM PRESTON, - - - - - - Complainant,

vs.

WM. C. WALSH, Commissioner of the General Land Office of Texas, - - Defendant.

Opinions of Judges WOODS and PARDEE, - and Decree.

COURIER-JOURNAL JOB ROOMS PRINT.

Circuit Court of the United States.

Fifth Circuit and Western District of Texas.

JANUARY TERM, 1879.

GEORGE HANCOCK, Trustee, etc., - - Complainant,
vs.
WM. C. WALSH, Commissioner of the General Land Office of the State of Texas, - - - - - - - - - Defendant.

In Equity; on Demurrer to Bill, and on Motion for Preliminary Injunction.

WOODS, Circuit Judge:

The original bill was filed on March 6, 1875, by George Hancock, a citizen of Kentucky, against J. J. Groos, who at that time was commissioner of the general land office of the State of Texas.

After the filing of the original bill, to-wit, on August 27, 1875, Hancock, the complainant, died, and the suit was revived in the name of William Preston, his devisee, upon a bill of revivor, filed January 26, 1876. Afterwards Groos, the defendant, died, and on April 12, 1879, a bill of revivor and supplement was filed against William C. Walsh, his successor in office, who entered his appearance and filed his demurrer to the original and supplemental bills.

The case made by the original and supplemental bills was as follows:

The Republic of Texas, after establishing her independence, adopted, substantially, the colonial policy commenced in 1825 by the government of Mexico to induce the settlement and colonization of its lands in Coahuila and Texas. Several acts of the congress of the Republic were passed to carry out this policy. By authority of these acts, thirteen colonial contracts were entered into by the Republic of Texas, through the agency of its President, with various colonial con-

tractors. Among these contracts was one made on January 29, 1844, between Samuel Houston, President of the Republic of Texas, and Charles Fenton Mercer, a citizen of Florida, and such associates as he should choose, the original of which is on file in the State Department of the State of Texas. By the terms of this contract, it was stipulated that Mercer should, within five years from the date of the contract, settle, upon so much of the public domain of Texas as was designated in the contract as Mercer's colony, and described by metes and bounds, as many immigrant families as he and his associates could induce to move thereon, at the rate of one family for every section of one square mile of vacant and unappropriated land; with the proviso that at least one hundred families should be settled on said lands during every year of the term of five years for which the contract was to run.

In consideration of the performance by Mercer and his associates of their part of the contract, the Republic of Texas agreed to convey to Mercer and his associates one section of six hundred and forty acres of land for every family that they should introduce and settle upon said lands, and to make a full and perfect title therefor to him and his associates as soon as they should exhibit to the proper officers the evidence that said families had been settled on the lands embraced within the limits of the colony, and, as a premium and recompense for their labor and expenditures in the performance of the contract, the Republic of Texas agreed and covenanted to give, grant and convey to Mercer and his associates, or their legal representatives, one section of six hundred and forty acres, or two half sections of three hundred and twenty acres each, for every ten families introduced and settled by them on said lands in pursuance of the contract. Mercer at once entered into possession of said lands and surveyed and occupied the same by his agents and colonists, in conformity with the provisions of the contract, and did manage and control the same as proprietor thereof, and, in order to perform the contract on his part, and as authorized by the contract itself, at once organized a joint-stock company, which was called "The Texas Association," composed of many men of wealth and character, and he and his associates in said company, in compliance with the stipulations of their contract, gave their time, labor and services to establish said colony, and did introduce and settle upon said lands not less than one hundred families in each and every year of the five years for which said contract was to run, and well and truly performed all the covenants by them to be performed under the terms of the contract; and for the accomplishment of these ends they subscribed and paid money exceeding twenty thousand dollars. Twelve hundred and fifty-six families were, in fact, introduced and settled within the limits of said colony within five years after the date of the contract

by Mercer and his associates, which, under the terms of the contract, would have entitled them to one thousand three hundred and seventy-six sections of land, of six hundred and forty acres each.

On January 29, 1849, the date at which said term of five years expired, Mercer and his associates offered to exhibit to the commissioner of the general land office of Texas proof of the facts above stated, to-wit: of the introduction and settlement of said families, and did in fact make a report, which is now on file in the general land office of Texas, giving the number and names of the colonists and families introduced and settled by them within the limits of the colony, verified by affidavit, and with the names of the required witnesses attesting and verifying all the facts therein stated, and showing the strict performance by Mercer and his associates of their covenants in said contract by them to be performed.

The contract between Mercer and the Republic of Texas further provided that lands lying within the limits of the Mercer colony, which had not been legally located prior to the date of the contract, should be held subject to be settled by Mercer and his associates for the period of five years, and should be set apart from the public domain and kept free from all future locations and claims, to be colonized in the manner specified in the contract, for the use and benefit of Mercer and his associates. At the date of said contract the Republic of Texas was seized by sovereign demesne of all the lands within the limits of the grant to Mercer, and by her statutes held out the promise that in all contracts for colonization an immediate equitable title should vest in the contractor, subject to be divested only upon the non-performance by him of the conditions annexed to the grant. The statutes and contract, taken together, created a trust whereby the State, retaining the legal title, empowered and required her proper officers to convey the legal title to the contractor as soon as evidence was produced of the performance of the contract by him. Yet, notwithstanding the premises, the former Commissioner of the general land office of Texas proceeded to issue certificates for lands within the colony of Mercer to all persons holding general certificates of location, and to issue patents therefor, and the defendant Walsh continues to issue patents upon surveys made within the limits of the colony, in violation of said contract. By reason of the performance by Mercer and his associates of the terms of the said contract, they became entitled to have and receive a full and perfect title to 1,256 sections of land within the boundaries of said colony, and also 120 sections of premium lands, being ten sections for every 100 families introduced by them and settled in said colony. Full evidence was adduced, and is of record in the archives of the general land office of the State of Texas, that

1,256 families, claiming and holding under said Mercer, were introduced and settled by him upon land lying within the limits of said colony, according to the terms of said contract.

The State of Texas has recognized the constitutionality and binding force of said contract by the decision of her Supreme Court and by the issue to the colonists under Mercer of 1,256 patents for land in said colony whereby the title to 1,256 sections was conveyed to the said colonists. There were more than 1,000,000 acres of land lying within the limits of Mercer's colony which have never been located and patented, but remain vacant, and are subject to the terms of the contract between the Republic of Texas and Mercer, and should, in equity, be reserved for the fulfillment of said contract, and, under the statutes of the State of Texas, it is the duty of the Commissioner of the General Land Office to issue to complainant and his associates certificates for the lands to which the said contract entitles them.

The joint-stock company, known as "The Texas Association," which was formed under said contract between the Republic of Texas and the said Mercer, had authority, under the terms of said contract, to name one or more trustees to act for said Association, and said Association did appoint the said Mercer sole trustee, with full authority and power to bind the Association, and act for it in the premises.

Mercer accepted the said trust, and continued to discharge the duties of trustee until the year 1852, when he sold and assigned his interest in the property of the Association to said George Hancock, who was thereupon duly appointed and chosen trustee and chief agent of the Association, in the place of Mercer, and invested with all the powers of such trustee and agent, and said Hancock continued to act as such trustee and agent up to the filing of the bill in this case, and afterwards to the time of his death.

The said George Hancock, soon after the sale to him by Mercer of his interest in said contract, came to the State of Texas, and found the rights of other colonial contractors under discussion in the Legislature, and in litigation in the courts. He was advised that there would be an equitable adjustment of all colonial contracts, including that of Mercer, and was, for that reason, requested by his associates to await the action of the State and confide in its justice. He did so, and urged the claims of himself and associates under said contract upon the officers of the State. He was thus delayed till 1858, when the Supreme Court decided in favor of the constitutionality and validity of said contract between the Republic of Texas and Mercer. Soon after, the war of rebellion broke out, which made it impossible for him, during its continuance, to assert his rights. Recently he has constantly petitioned the Legislature of the State for redress, but has never received any relief.

After the appointment of said Walsh as Commissioner of the General Land Office of Texas, the present complainant gave him notice in writing of the rights of the Texas Association and of complainant, and requested him not to issue any land certificates or patents for lands within the limits of the Mercer colony. Said Walsh refuses to comply with such request, and threatens to continue, and has continued, and still continues, to issue certificates and patents for lands within the Mercer colony to persons not claiming under or in privity with the contract of Mercer. At the same time the present complainant demanded of defendant Walsh, Commissioner of the General Land Office, that he should issue to complainant, as chief agent of the Texas Association, certificates for 1,376 sections of land, according to the terms of said contract, but Walsh refused, and still refuses, to comply with such demand, and refuses to deliver to complainant any land certificates whatever.

No land certificates, or patents for land, have ever been issued either to Mercer, Hancock, the Texas Association, or the complainant, for lands to which they were entitled under said contract. George Hancock, the successor as trustee and chief agent of the Texas Association of the said Charles Fenton Mercer, by his last will and testament, appointed the present complainant, William Preston, to act as trustee and chief agent of the Texas Association, maintain and prosecute its claims under said contract, or any suit based thereon, to revive the same, and to do all things which the said Hancock, under the said agreement of association and contract, might do, and did devise or bequeath to said William Preston all his right, title and interest in and to the estate, stock and property of said Association. Complainant accepted said trust, and he is now chief agent and trustee of the Texas Association, and has been and is recognized as such by the Association and the members thereof.

In the convention which assembled July 4, 1845, to frame a constitution for the State of Texas, preparatory to her admission as one of the United States of America, attempts were made to declare colonial grants and contracts, including the Mercer contract, to be null and void *ab initio*. All such propositions were defeated, and no clause making such declaration was inserted in the constitution, but an ordinance adopted by the convention declared that the Legislature should provide for proceedings in the courts by the Attorney-General or district attorneys to test the constitutionality, legality and good faith of all colonization contracts, including Mercer's, entered into by the Republic of Texas, and to decide whether the conditions of said contracts had been performed by the contractors.

The Legislature of Texas has never made any such provision of

law as contemplated by the ordinance of 1845, although Mercer and Hancock, and the Texas Association, have made repeated applications for the passage of such an act, whereby they could assert and vindicate their rights in the courts.

All colonial contracts made by President Houston for the Republic of Texas, except the contract with Mercer, have been adjudicated and settled by the State of Texas, either by agreement of the contractors with the State, or by judicial proceedings authorized by special legislation for the particular case.

The joint resolutions of the Congress of the United States, providing for the admission of Texas as one of the States of the Union, declared that the State of Texas should retain all the unappropriated lands within her borders, to be applied to the payment of the debts and liabilities of the Republic of Texas, and the convention of 1845, which framed a constitution for the State of Texas, recognized and, in effect, admitted that the contract of Mercer was one of the liabilities of the Republic.

On February 3, 1845, the Republic of Texas, by legislative act, required Mercer and his associates to have the lines of their colony actually surveyed and marked by the first day of April, 1845, and, notwithstanding the great difficulty and expense of making such survey within so short a time, the same was accomplished and marked before the time limited by the act of Congress.

Neither Mercer nor his associates, nor Hancock, nor the present complainant, have ever abandoned or failed to assert their rights under said contract, but have continually set up the same openly and publicly, and, in all ways open to them, have asserted the validity of said contract, and the full performance of its conditions by said Mercer and his associates.

Such were, in substance, the averments of the original and supplemental bills.

The original bill prayed for an injunction restraining the defendant and his successors, in the Office of Commissioner of the General Land Office of Texas, from allowing any location or survey of lands lying within the limits of the Mercer colony not yet patented, and from issuing any patent or grant of land within said limits, except to the complainant or the Texas Association, and from doing, or suffering to be done, any act whereby such lands might be located, surveyed or patented to any other person or persons except complainant, to be held by him in trust for the Texas Association. The bill also prayed general relief.

To the original and supplemental bills demurrers were filed on the following grounds:

1. Because the suit is in effect a suit against the State of Texas, and seeks to deprive the State of the right and power of disposing, in her own way, of her own public lands.

2. That if complainant is entitled to any relief, it must be sought through the political department of the government of the State of Texas.

3. That the case made by the bills does not entitle complainant to the relief prayed.

4. That the claim is barred by lapse of time.

5. That defendant is an executive officer of the State of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law.

6. The bill is not sworn to.

7. This Court is without power to restrain or enjoin defendant, he being an executive officer of a sovereign State.

8. That the acts of defendant complained of in the bill involve the exercise of official discretion, and are not merely ministerial acts, and he can not therefore be enjoined.

9. The bill shows that defendant can not refrain from patenting the lands mentioned, without violating an official duty.

10. The bill shows that no injury can come to the complainant pending the suit.

At the hearing of the demurrer, counsel for complainant moved for an injunction *pendente lite*, according to the prayer of the bill. The demurrer and motion were argued at the same time.

This is not a suit against the State of Texas. In the case of *Osborn v. The Bank of the United States*, 9 Wheat, 738, it was held that "in deciding who are parties to the suit, the Court will not look beyond the record; that making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest, and that a State can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case."

The doctrine of this case was approved in the later case of *Davis v. Gray*, 16 Wall., 203. See also *Dodge v. Woolsey*, 18 How., 331; *State Bank of Ohio v. Knoop*, 16 How., 369; *Debolt v. Ohio Life and Trust Company*, 16 How., 432; *Debolt v. The Mechanics and Traders' Bank*, 18 How., 380, and the *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

This suit is brought, not against the State, but against an officer of the State, who, it is alleged, without the authority of any valid law of

the State is, by an unwarranted assumption of power, so using his official position as to invade rights secured to complainant by the Constitution and laws of the United States. This is the very case put by the Supreme Court of the United States in *Osborn v. The Bank of the United States, supra*, where it is decided that "a Circuit Court of the United States may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of complainant." To the same effect are the cases of *Davis v. Gray, supra*, and *Board of Liquidation v. McComb*, 92 U. S., 531.

It appears from the bill that Mercer concluded with the Republic of Texas, a contract of colonization, that he performed its conditions, that rights have accrued to him and his associates, that these rights have been ascertained and fixed as to quantity and character, that he and his associates have a vested interest in the lands described in the contract, and that the State of Texas now holds the nominal legal title only, and that the defendant is violating his official duty as Land Commissioner by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates.

Is it within the power of the State of Texas to disregard the contract made by Mercer with the Republic of Texas? If it is not, then, if the Commissioner of the General Land Office is invading the rights of Mercer or his successors under the contract, either with or without the apparent authority of the Legislature, his acts should be restrained by this Court.

The Supreme Court of Texas, in the case of *Melton v. Cobb*, 21 Texas, 539, has held that the contract of the Republic of Texas with Mercer was a valid contract. The Court, in that case, declares that the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was, therefore, binding upon the Republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an obligation on the part of the Republic to convey the legal title to the lands as soon as the conditions had been performed.

It was a liability of the Republic, which held the title to lands which it had contracted to convey, and for which the consideration has been paid in full. It was as complete and binding a liability as a sovereignty could assume. And the debates in, and action of, the Convention of 1845, convened to frame a Constitution for the State of Texas, show that these colonial contracts, including Mercer's, were regarded as liabilities of the Republic. (See debates of the Convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.)

Now, what is the relation of the State of Texas to this liability?

By the first of the joint resolutions passed by the Congress of the United States for annexing Texas to the United States (5 Statutes at Large, 797), it was declared that "Congress doth consent that the territory properly included within and rightly belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, adopted by the people of said Republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

The second of said joint resolutions declared "that the foregoing assent of Congress is given upon the following conditions, to wit: * * * Second, said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * and all other means pertaining to the public defense belonging to the Republic of Texas, shall retain all the public funds, debts, etc., * * * and all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct, but in no event are said debts and liabilities to become a charge upon the government of the United States."

These resolutions, on July 4, 1845, were accepted by an ordinance which passed the convention with but one dissenting vote, which was signed by every member of the convention, and which, after reciting the resolutions, declared, "that in order to manifest the assent of the people of this Republic, as required in the above-recited portions of said resolutions, we, the deputies of the people of Texas, in convention assembled, in their name and by their authority, do ordain and declare that we assent to and accept the proposed conditions and guarantees contained in the first and second resolutions of the Congress of the United States aforesaid." (Hartley's Digest, 44, 47.) On the faith of the acceptance of these resolutions, Texas was admitted as a State into the Union of States.

Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions?

It seems to me to be clear that it is not. The passage of the resolutions by the Congress of the United States and their acceptance by the deputies of the people of Texas constituted either a treaty or a contract. It probably can not be considered as a treaty, because it was not made by the President by and with the advice and consent of two-thirds of the Senators present, as prescribed by section 20, article 2, of the Constitution; unless the long acquiescence of all departments of the Government gives it the force and effect of a treaty.

Whether it be a treaty or a contract, it is alike within the clause of the Constitution of the United States which forbids a State from impairing the obligation of contracts. (Green vs. Biddle, 8 Wheat, 1.) If it is to be considered a treaty it is protected by that second clause of article 6 of the Constitution of the United States, which declares, "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." If this is a treaty, the Legislature of Texas can no more repeal or annul it than it can annul or repeal a clause in the Constitution of the United States. If it is to be considered as a contract it is equally beyond the power of the Legislature; for a State is as much forbidden by the Constitution from passing laws to impair the obligation of contracts made by herself as by other parties. By no device that a State can resort to can she escape this constitutional prohibition. It is perfectly clear that she can not authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the State of Texas may be enjoined from invading his rights by a disregard of the compact made by the State of Texas on the faith of which she was admitted as a State of the Union.

The State of Texas has never repudiated the contract made with Mercer. On the contrary, it has been pronounced valid and binding by her Supreme Court, as we have seen in Melton vs. Cobb, *supra*. The act of the Legislature of Texas, of February 2, 1850 (Hartley's Digest, 702), is the only act to which we have been referred that gives authority to any one to issue certificates, to be located within the Mercer Colony, and those were to be issued, not generally, but only to settlers in the colony, who were entitled to lands under the Mercer contract, and not by the Commissioner of the General Land Office, but by a special commissioner, appointed by the Governor, who was to hear proof and determine what colonists were entitled to the lands. This is a recognition, rather than a repudiation, of the contract.

There is no act of the Legislature of Texas, directly imposing upon the Commissioner of the General Land Office, the duty of issuing certificates for location within the Mercer colony, and if there were, it would be null and void.

Nor have we been referred to, or have we been able to find, any act which clothes the Commissioner of the General Land Office with judicial or *quasi* judicial functions in regard to the issue of certificates

and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that, by reason of the facts stated in the bill, the State of Texas becomes a trustee for him and his associates, seems to be well taken.

A State may become a trustee. (Perry on Trusts, section 41.)

The contract between the Republic of Texas and Mercer, was a grant of lands to Mercer, upon a condition subsequent, which, according to averments of the bill, was performed. The legal title remained in the Republic, which thereby became a trustee for Mercer and his associates. (3 Washburn on Real Property, third edition, page 525, *et seq.*)

On the execution of the contract, Mercer took a vested estate, defeasible only on the non-performance of the condition.

This trust imposed upon the Republic of Texas, was not extinguished by the formation of the State of Texas, and her annexation to the Union; but was imposed and fastened upon the State as the sovereign successor of the Republic. (New Orleans vs. United States, 10 Peters, 662; Smith vs. United States, 10 Peters, 326; United States vs. Arredondo, 6 Peters, 691; Pollard's heirs vs. Kibbe, 14 Peters, 353.)

The State of Texas, therefore, is in the same plight, as regards the rights of Mercer and his associates, as the Republic was, and holds the relation to them of trustee to *cestui que trust.* We have already seen that the State of Texas, by her own express consent, given in the most solemn manner, agreed to hold the public domain of the Republic and apply it to the extinguishment of the liabilities of the Republic. She, therefore, became a trustee for the parties to whom the Republic was liable, not only by operation of law, but also by her own express contract.

This is an express trust which is defined to be a trust created by instruments that point out, directly and expressly, the property, persons and purposes of the trust. (Perry on Trust, section 24.) If the State were, therefore, a party to this suit, it would not be competent for her to set up lapse of time or any defense analogous to the statute of limitations to protect her from being called on to execute the trust. For, as between trustee and *cestui que trust*, in the case of an express trust, such as this, the statute of limitations has no application, and no length of time is a bar. (Perry on Trusts, section 836, and cases cited.)

Much less can an officer of the State—who, according to the averments of the bill, is, by his acts, done without warrant of any valid

law of the State, invading the rights of the beneficiaries of a trust assumed by the State—plead the lapse of time against the enforcement of the trust.

But, even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the averments of the bill offer reasonable excuse for the delay in bringing the suit; and it is the law of this State, that when such excuse is offered, the Court will not apply the limitation. (McKinn vs. Williams, 48 Texas, 89.)

It is objected that the bill is not sworn to. The want of verification of the bill is not ground of demurrer. If the bill is not sworn to, the Court will not allow an injunction to go unless its averments are sustained by evidence. The laws of Congress, of the Republic, and of the State of Texas, and the facts of public history, of all of which the Court takes judicial notice, the exhibits to the bill, and the the affidavit on file, sufficiently establishes its averments.

The foregoing discussion has covered all the grounds of demurrer, and, in the opinion of this Court, none of the grounds are well taken.

This is not a suit against the State, and does not seek to deprive her of the power of disposing of her own lands in her own way; for the lands which the complainant seeks to appropriate are not the property of the State.

The relief sought by the bill may be properly granted by a Court of the United States; and the complainant is not compelled to seek his rights through the political department of the State Government, to which he and his predecessors have, according to the bill, repeatedly appealed in vain.

The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorizes the defendant to disregard the contract of the State is null and void, and therefore is not binding in law. If the defendant violates the provisions of a contract protected by the Constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of this State, and no claim that defendant is performing an official duty will avail him.

The averments of the bill make a case of the highest equity, which imperatively demands the interference of this Court to prevent irreparable injury to complainant and his associates. The complainant seeks to enforce an express trust, which no lapse of time can render stale.

The case seems to run on all fours with the case of Davis vs. Gray,

16 Wall, *supra*, which went up from this district, and in which the Governor of the State and the Commissioner of the General Land Office were enjoined from issuing patents for lands within the territory granted by the State of Texas to the Memphis & El Paso Railroad Company. The conclusion seems inevitable that the demurrer must be overruled, and that the injunction should go as prayed in the bill. And it is so ordered.

(See over.)

Circuit Court of the United States.

Fifth Circuit and Western District of Texas.

JANUARY TERM, 1879.

WILLIAM PRESTON, - - - - Complainant,
vs.
WM. C. WALSH, Commissioner of the General Land Office of the State of Texas, - - - - - - - - - Defendant.

In Equity, on the Merits.

PARDEE, Circuit Judge:

Justice Field, on the Ninth Circuit, in the case of Cole Silver Mining Company vs. The Virginia and Gold Hill Water Company, reported in 1 Sawyer, 685, refused to hear questions of law previously determined by the Circuit Judge in the same case, saying:

"The Circuit Judge possesses equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one Judge upon a question of law should be disregarded, or be open to review by the other Judge in the same case."

The proposition, so evident upon its face, acquires greater force when the Circuit Judge is called upon to consider the rulings of the Circuit Justice in the same case. (Volume 2, Fisher's Pat. Cases, p. 120.)

This case has been before this Court for hearing upon demurrer and for injunction *pendente lite*, and was heard and decided by my predecessor, Judge Woods, now Circuit Justice of this Circuit. Justice Woods' decision covers many points—is full and elaborate, and is reported by himself in 3 Woods, 351.

The points decided, as stated by the Judge himself, are:

1. This suit, so far as it seeks to restrain the defendant's action, is not a suit against the State of Texas.

2. The colonization contract made by the Republic of Texas, acting

by Samuel Houston, President, on January 29, 1844, with Charles Fenton Mercer, was valid and binding on the Republic.

3. By the terms of the joint resolution of the Congress of the United States, for the annexation of Texas as a State in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant and unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the Republic of Texas. This resolution having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions.

4. Whether the resolution of annexation and its acceptance by Texas is to be considered as a treaty or contract, it is equally binding on the State and she can not escape from its obligations.

5. A State may become a trustee.

6. A trust assumed by the Republic of Texas was not extinguished by the formation of the State of Texas, and the annexation to the United States; but was fastened upon the State as the sovereign successor of the Republic.

7. Neither lapse of time, nor any defense analogous to the statute of limitations, can be set up by the trustee of an express trust as a defense to his liability to execute the trust.

An examination of the full opinion will show that each of these propositions is fully decided, upon reason, and sustained by authority as well as many other questions not stated in the syllabus.

So far, then, as any of these questions now come up for consideration in determining the rights of the parties now before the Court, they must be taken as settled for this case, in this Court, if for no other case nor any other Court; and for further authority see Aurora vs. West, 70 Wall, 99.

Since the decision on the demurrers, and the motion for preliminary injunction, the complainant has, by leave obtained of the Court, filed an amended bill. Said amended bill, in addition to the matters previously alleged in the original bill, and in other bills of revivor and supplement, charges:

That the contract between the Republic and Mercer created an express trust as to all the lands embraced in the limits assigned to the Mercer colony, which trust has never been satisfied, released, abandoned, nor forfeited.

That by the stipulation attending upon the annexation of Texas to the Union, an express trust was created upon all the vacant and unappropriated lands retained by Texas, to secure the payment of all the debts and liabilities of the Republic.

That the rights acquired by Mercer and his associates constituted

one of the liabilities secured by this express trust, resulting from annexation, and that the said liability has never been satisfied, extinguished nor forfeited.

That there was never any intention of the deputies of the people in convention assembled to declare any forfeiture of colony contracts, or to establish by any constitutional enactment how and why any forfeiture should be declared; and that no method has ever been declared by law for the forfeiture of such grants and the disposition of the lands.

That, notwithstanding the grant to Mercer and his associates, the defendant and his predecessors in his office, without warrant of law, have assumed and pretended to make and issue and deliver certificates and patents for lands within the limits of the Mercer grant, to numerous persons not claiming through or under privity of Mercer or the Texas Association, which persons have paid money and made improvements in ignorance of their infringement on the rights of the Texas Association, and that this has been done to such an extent that the remaining land within the limits of the Mercer grant are inadequate to satisfy the just demands and rights of the complainant.

That complainant is unwilling to interfere with the persons so acquiring rights, as they have expended money and labor in apparent good faith, and an interference would result in great hardship.

That the defendant is violating the preliminary injunction issued in this case, and, confederating with O. M. Roberts, Governor of Texas, is issuing certificates and patents for lands in contempt of this Court, and to the great injury of complainant.

That defendant confederating with said Roberts has procured the passage of an obstruction act by the Legislature of the State, which act makes it the duty of the Governor to countersign all certificates and patents of public lands.

That the lands within the limits of the Mercer colony, by reason of their location and fertility, are more valuable than the other vacant lands in the State, and that, if orator is driven to the other lands to satisfy his claim, quantity should compensate for quality.

That, under the Constitution and laws of Texas, as they existed when Mercer's rights attached, and when this suit was instituted, the records, and surveys, and plats, and maps, relating to the public lands, were to be kept in a general office, to be under the charge of a general land commissioner, who, upon proper showing, should issue patents for lands under the seal of the State. And that defendant is such Commissioner, in charge of such office and that he and his predecessors, though duly demanded, have refused to issue to orator, and the Texas Association, such certificates and patents as the records of the

land office clearly show orator and the Texas Association are entitled to have and receive, and that until such delivery of certificates and patents, there is no duty devolving upon any other officer, or department of the government of the State, nor upon orator, nor the Texas Association, under the terms of the Mercer contract.

And the bill prays for a discovery, for the perpetuation of the preliminary injunction; for a further injunction, restraining defendant, as General Land Commissioner of the State of Texas, from issuing certificates or patents, for any of the vacant and unappropriated lands of the State, within or without the limits of the Mercer Colony grant, until orator's just demands are satisfied; for a mandatory injunction, compelling the defendants to issue patents to orator, for the use of the Texas Association, covering about two thousand seven hundred and fifty-two sections of land, as grants, premiums and preemptions, within the limits of the Mercer colony; or, if not found therein, then for an equivalent from the other vacant lands of the State, and for general relief, etc.

The defendant filed a plea in bar, and a disclaimer and answer, and a motion to dissolve, prior to filing of the amended bill.

After the amended bill, he filed a general answer, which, of course, waived his pleas, and the original answer was merged in the last formal sworn answer.

This answer, containing the whole defenses exhibited, sets up:

1. A denial of performance on the part of Mercer and his associates, of the various obligations devolving upon them, under the contract; specifically, to-wit:

(*a*) That Mercer never introduced settlers, as bound by his contract.

(*b*) That he never made the surveys, and furnished the plats, maps, field-notes, etc.

(*c*) That he never built the cabins, or small houses.

(*d*) That he never furnished, and kept on hand, the ammunition supplies.

(*e*) That his settlers were not armed with rifle, yager, or musket.

(*f*) That he did not make the reports required by the contract.

(*g*) That he and his associates did not obtain the act of incorporation required.

2. That Mercer and his assistants were required, by a joint resolution of the Republic, approved February 3, 1845, to have the lines of that colony land actually surveyed and marked by April 1, 1845, under pain of forfeiture; and that therein Mercer and his associates failed.

3. That the map bearing date May 1, 1845, filed with bill marked exhibit "E," appeared to be of recent date, and had been surreptitiously deposited in the office of the Secretary of State, without the knowledge or consent of the officer, and that said map was not made in accordance with the contract, did not give the correct boundaries or limits, and took in about 3,000 square miles more than the contract covered.

4. That the contract was made against the will, and in contempt of the people of Texas, having been made after both houses of the Legislature had passed a bill repealing the authority theretofore given the President to make such contracts, and only the day before such bill became a law, by passing over the veto of the President; and that Mercer was well aware of the opposition of the people, as he was present, attending on the session, attempting to procure from the Congress an extension of the Peters contract, in which he was interested.

5. That the opposition of the people continued, and that the Convention of 1845 adopted an ordinance, denouncing colony contracts as unconstitutional and void, and as operating a monopoly, to the exclusion of citizens, soldiers, and creditors of the Republic; and providing that it should be the duty of the Attorney-General of the State, or the District Attorney of the district in which any portion of the colonies might be situated, as soon as the organization of the State should be complete, to institute legal proceedings against all colony contractors; and providing that if any contracts should be found, upon such investigation, unconstitutional, illegal, or fraudulent, or that the conditions had not been complied with, according to its terms, such contract should be adjudged null and void, but without prejudice to actual settlers. That said ordinance was adopted by a vote of the people, and thereby became a part of the fundamental law of the land, and that the State organization was completed February 16, 1846.

That, in obedience to said ordinance, J. W. Harris, Attorney-General of the State of Texas, on the eleventh day of October, 1846, filed in the District Court of Navarro county, in which county part of the Mercer grant was situated, a suit in the name of A. C. Horton, Governor of the State, for and on behalf of said State, as plaintiff, against Charles Fenton Mercer, and his associates, as defendants, alleging non-performance on the part of said Mercer and his associates, and illegality and unconstitutionality from the beginning, and praying that the contract be declared null and void from the beginning. That said Mercer and his associates were duly and legally cited to appear and answer; and that thereafter, at the September term, 1848, the said suit was fully heard and determined; and it was

fully and finally adjudged and decreed, upon the verdict of a jury, that the said contract of January 29, 1844, was null and void.

That such judgment is still in full force, unreversed and unavoided.

6. That the parties in that suit are identical in interest and privity with the parties to this suit, and that the subject-matter is the same; that the District Court of Navarro county had jurisdiction; that Mercer and his associates were represented, and had a fair trial, and that the said judgment has the force of a thing adjudged, and the same is a full and complete bar to this action.

7. That the State has never, by the act of February 3, 1850, nor by the act of August 12, 1870, nor by any other act, recognized the validity of the Mercer contract. On the contrary, it has always acted on the theory of its invalidity and all legislation in relation to its public lands or in relation to relief to actual settlers in the Mercer colony limits, has stipulated against the contractors taking any benefit from the legislation.

8. That no trust has ever been created in favor of Mercer and his associates; no title has ever vested; no possession has been had, and that the complainant or the Texas Association are not entitled to any of the public lands by reason of said contract either for settlers or for premiums.

9. That defendant is a sworn and bonded officer, governed by the laws of the State, and that by law, approved April 19, 1879, when questions may arise, he is obliged to consult the Governor and follow his advice. That in this matter he has advised with Hon. O. M. Roberts, Governor, and has been instructed by the Governor not to issue any certificates for land to said Mercer and associates, and to those claiming by or through or under them, and that he is advised, and believes that it would be a breach of his official bond, and a violation of his official oath to issue any such certificates to complainant or the Texas Association.

10. That William Preston, complainant, has no authority to stand in judgment in this suit; that the members of the Texas Association are the proper parties to this suit, and this suit is defective for want of such parties.

11. That the settlers in the limits of Mercer colony are interested in the lands claimed, and that the bill is defective for the want of such parties.

12. Pleading the statutes of limitations and staleness of demand, denying secrecy and fraud, but claiming open and notorious repudiation by the State, of complainant's demands.

And the orator denies conspiracy with the Governor; denies having infringed the injunction in this case, and makes all the discovery that defendant finds possible in the premises.

To this answer a general replication is filed by the complainant.

This statement of the pleadings, taken in connection with the full statement of the pleadings and facts, as reported in the case of Hancock vs. Walsh, to which reference is made, shows the issues presented to this Court.

The evidence offered and admitted on this hearing is bulky and voluminous, and can not be recapitulated here, even if necessary.

The following may be taken as the substance, and it will be found sufficient, to understand and support the decree allowed in the case:

The complainant has established the contract between the Republic, through Sam. Houston, President, and Charles Fenton Mercer and his associates, as alleged in the bills; the entrance of Mercer upon the duties devolving on him under the contract; the organization of the Texas Association; the appointment of surveyors and colonization agents; the running of lines and surveys; the introduction of one hundred and nineteen families within the first year of the grant; the making of the survey of the boundary limits of the colony grant by April 1, 1845; the settlement of twelve hundred and fifty-six families within the limits of the colony prior to October 25, 1848; the appointment of Mercer as chief agent and trustee for the Association; the subsequent appointment of Hancock as chief agent; Hancock's death and the appointment of Preston, ratified by the Association, as chief agent; the entrance of the gentlemen upon the performance of their duties as agents of the Association, and the activity displayed by them respectively, in furthering the objects and interests of the colony and the Association. The employment of counsel, the expenditure of money, and the persistent applications made to the political department of the State of Texas for relief. Further, the complainant has shown that Mercer, as agent, made reports as required by contract, up to and for the year 1847, to the government of Texas; that Mercer is dead long since, and that all his papers and documents, among which were copies of his correspondence and reports in relation to the Mercer colony, have been lost and destroyed.

In short, the substance of the original bill is established.

There are only two points questioned seriously, as not yet proved.

1. Preston's right to act as chief agent and represent the Association.

2. The proof of the settlement of twelve hundred and fifty-six families prior to the expiration of the grant.

As to the first point, it is shown that Hancock was chief agent in accordance with the articles of association with power to substitute; that he died, and, in his last will and testament, transferred his shares

to Preston and appointed Preston chief agent. It is shown that Preston assumed the duties of chief agent, and that his assumption has been approved and ratified by the other share-holders.

Any defect of Preston's authority to represent the Association, has been cured by ratification. It is elementary in the law of agency that ratification of the acts of an agent amounts to as much and has the same effect as an original appointment.

The proof of the introduction and settlement of twelve hundred and fifty-six families is made by Crockett's report.

Under the act of February 2, 1850, Crockett was the sworn and bonded officer, but agent of the State to issue patents to such of the settlers of Mercer's colony as were intended to be relieved by the act.

Under the law, he could only issue certificates to such colonists as proved, by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas, and became citizens of the Mercer colony prior to October 25, 1848.

Crockett's own sworn report shows that twelve hundred and fifty-six families made such proof to his satisfaction, and that he issued certificates as required by the law.

Now, it was convenanted in the contract between the Republic and Mercer, that all the unlocated lands lying in the limits of this colony grant, at the date of the grant, should be exclusively set apart and reserved for five years, for the use of Mercer and his associates, to be colonized by them under the contract.

The depositions of Pillans and others show that at the date of the contract there were very few, if any, locations within the Mercer colony limits.

There is no direct evidence to show whether the twelve hundred and fifty-six families, proved by Crockett to have settled prior to October 25, 1848, were all or any of them introduced by Mercer or the Texas Association. Nor is there any proof to show the negative.

The families were there, and settlers.

They could only be there, lawfully, under Mercer and the Texas Association.

In the absence of proof, it is a strong presumption that they were settlers there lawfully; that is, under Mercer and the Texas Association; not as trespassers and squatters.

Besides this presumption, I do not regard it as absolutely necessary that every settler who located in the Mercer colony should have been previously personally solicited and induced thereto by Mercer or his agents. The contractors could not have so contemplated.

One settler would naturally induce others, and the advertisements and maps and advantages and improvements would certainly aid in the scheme of colonization and settlement.

The depositions offered by the defendant upon this subject (which are amenable to the charge of incompetency, as hearsay evidence,) though given full force as evidence, are not strong enough to rebut this presumption in favor of law and order.

The witness knew, had heard, of no one who claimed to have been induced to settle by Mercer or his agents, or under the Mercer colony grant.

And it might be noticed, under the law of 1850, it was not necessary, in order to receive the donation offered by the State, that they should claim under Mercer.

And it is plausible to say that, under the hostile attitude evinced by the people of the State at that time towards the colonization contracts, many settlers might have been deterred from claiming under obnoxious titles, particularly when such claim was wholly unnecessary.

The allegations in the amended bill of complainant, are also, in the main, established, except in relation to the conspiracy alleged between the defendant and Governor Roberts, and in relation to the charge of contempt for violation of the injunction heretofore issued in the case. Upon this last-mentioned matter, the proof fully exonerates the defendant.

The defendant shows by the expositions of various witnesses, mostly old settlers, that Mercer and his associates had not complied with the various stipulations and details of the contract in many small matters, so far as the knowledge of the witnesses extended, but this evidence is negative, and at this late date it can hardly raise a presumption even of non-compliance.

In relation to this, it may be well to notice, that, by the terms of the contract, a forfeiture or determination of the contract was only to result from non-performance, on the part of Mercer and his associates, in relation to the introduction of a certain number of families within certain fixed periods; for instance, one hundred families by May 1, 1845, two hundred and fifty families within two years, and one hundred and fifty families within each of the remaining three years the contract was to run.

And further, that no default or determination was to operate otherwise than prospectively.

The defendant fails to show the truth of his charge in regard to the survey of 1845 and the manufacture of the map of that date.

The remaining allegations of defendant's answer—leaving out arguments and conclusions of law therein contained—may be considered as substantiated. The proceedings in the Navarro County Court are proved; with the variance that the suit was brought in the name of A. C. Horton, acting Governor, for the benefit of the people of

Texas, instead of, as alleged in the name of A. C. Horton, Governor, for and on behalf of the State of Texas, and that there is no proof of service, by publication or otherwise, of the defendants. It is true that the record produced shows that service by publication was ordered by the Court and by the sheriff; but it does not show how, where, or when publication was made, or that it was made at all. The recital in the alleged judgment of the words, "and it appearing to the Court that service had been perfected," can not cure the defect.

As I understand the law, the record must show affirmatively that the forms of service provided by law have been complied with, before the judgment of a Court, otherwise having jurisdiction, can have the force of a thing adjudged.

Certainly the insertion in the judgment of a few words can not have the talismanic effect of supplying the want of service.

I am not at all certain but that the many other glaring defects on the face of the record, so far as proved, or so ably argued by counsel, strike the entire proceedings in Navarro County with absolute nullity. The defects are most certainly very serious relative nullities.

Now, taking the facts as I have found them to be disclosed by the evidence, I am satisfied that the following propositions of law, as applicable in this case, are clearly maintainable:

1. The contract made by the Republic of Texas, acting by Samuel Houston, President, on the eighth day of January, 1844, with Charles Fenton Mercer, was valid and binding on the Republic.

2. That contract created an express trust in favor of Mercer and his associates, of all the unlocated lands then lying within the limits fixed by the contract, to secure the performance of the contract.

3. That by the compact of Annexation, the State of Texas assumed all the obligations, liabilities and duties, including those resulting from the express trust, theretofore bearing on the Republic of Texas, in relation to said contract with Mercer.

4. That under the Constitution of the United States, and the resolutions and compact of annexation, the State of Texas has been, and is, without power, by any law, to impair the obligation of said contract, or the trust resulting therefrom.

5. Neither lapse of time, nor any defense analogous to the statute of limitations, can be set up by the trustee of an express trust, as a defense to his liability to execute the trust.

6. That while the ordinance adopted by the Convention in 1845 (Hartley's Digest, p. 84), afterwards ratified by a vote of the people, may have conferred power upon the law officers of the State to sue for, and jurisdiction on the Courts to enforce, forfeitures on the colonization

contracts, yet that the proceedings had and the judgment rendered in the District Court of Navarro county, in the years 1847 and 1848, wherein A. C. Horton, acting Governor, for the benefit of the people of Texas, was plaintiff, and Charles Fenton Mercer and associates, unknown, were defendants, were absolutely null and void, for want of legal notice to the defendants.

7. That the State of Texas, by law, has never repudiated the contract with Mercer, or the trust resulting therefrom.

8. That the Court of Equity has jurisdiction to prevent, by injunction, the waste, alienation or destruction of a trust estate.

9. That while the Circuit Courts of the United States have no jurisdiction to entertain a suit against a State of the Union, they have jurisdiction of and will entertain a suit brought by a proper party against an officer of a State, who, under color of his office, but without lawful authority, is wasting, alienating or destroying a trust estate; although the State may be the trustee and remain silent.

10. That in such a suit, where the State is no party, and yet is declared to be the trustee of an express trust, the defendant is without right or interest to plead in defense a repudiation by the trustee, to shield himself from unlawful conduct.

The first five of these propositions of law are laid down by Judge Woods, well supported by authority, and, as I have shown, supra, are the law of this case.

The sixth proposition is undisputed law.

Hollingsworth vs. Barbour, 6 Peters, 476.

Harris vs. Hardeman, 14 Howard, 343.

See 7 Texas, 483; 9 Texas, 353; 17 Texas, 647; 27 Texas, 441; 45 Texas, 507.

And the case of Treadway vs. Eastburn, lately decided (N. R.).

The seventh proposition is shown, by an examination of the various laws of Texas, cited on both sides in this case; and I might, with safety, go further than I have, and say that, under section 10, article 1, of the Constitution of the United States, the State could pass no valid law impairing the obligations of Mercer's contract.

The eighth and ninth propositions are fully sustained by the decision of the Supreme Court in the case of Davis vs. Gray, 16 Wallace, 203.

The tenth proposition is a corollary legitimately following the decisions in Davis vs. Gray, and Hancock vs. Walsh.

The fact is, that these two last mentioned cases furnish nearly the entire law of this case.

At the same time, I deem it proper to say that nearly every proposition involved herein, I believe, from the examination I have been

able to make, and, from the authorities cited in argument by the distinguished counsel on both sides who have aided in this case, can be, and is, fully sustained by Texas authority, as declared by the Supreme Court of the State.

Now, applying the law as I understand it, to the facts of this case, I think it clearly follows that complainant is entitled to a decree in his favor, embodying such relief as he has asked, and the Court has jurisdiction to give.

He asks for an injunction restraining the defendant, as Commissioner of the General Land Office of the State, his servants, agents, employes, etc., from issuing, passing, or granting any certificates or patents for lands lying within the limits of Mercer colony, to any person or persons other than the complainant or the Texas Association, and persons holding and claiming under or in privity with the said Association; and restraining the defendant, etc., from hindering and obstructing complainant in the execution and performance of the Mercer contract, and in obtaining the certificates and patents of lands to which the complainant and the said Association are entitled under the terms and conditions of said contract.

The relief is within the jurisdiction of the Court, and is after the manner of the proceedings in equity.

The complainant asks further, for a mandatory injunction, to restrain the defendant from refusing to issue to complainant, patents and certificates for thirteen hundred and seventy-six sections of land, to which complainant is entitled, under the contract, by reason of settlers introduced thereunder; and to thirteen hundred and seventy-six sections of land, to which he is also entitled, under said contract, by tendering in payment thereof, twelve dollars in coin and scrip to the amount of $540, or its equivalent in money, for each section, and restraining said defendant from hindering him from locating the said certificates and patents upon any of the vacant and unoccupied lands of Texas, within or without the limits of the Mercer colony, etc.

This relief, no matter how just, I conceive to be beyond the jurisdiction of the Court, in this case, for want of proper parties.

The whole theory of this case is, that the contract with Mercer created an express trust, which, by operation of law and compact, devolved upon the State of Texas; that the State of Texas is now the trustee; the Texas Association the *cestui qui* trust; that the legal title is in the State; the equitable title in the Association. It has been vehemently alleged by complainant, and adjudged by this Court, that the State is not a party to this suit.

The relief asked, is in the nature of specific performance of the contract; or, at least, it amounts to a decree for title.

For the Court to grant such relief, it is imperative that the party required to perform, or who holds the legal title, should be before the Court.

Pomeroy on Specific Performance, sec. 483, *et seq.* Daniell's Ch., 194, 196.

Perry on Trust, sec. 873, 874; see Justice Field in 1 Saw., 685; and authorities can be multiplied to any extent.

It will be noticed, too, that under the contract, after the performance of certain conditions precedent (with regard to survey and selection of sections), it is the Government of Texas that is to convey, or cause to be conveyed, the title to the lands surveyed and selected.

To grant the relief asked, would be to compel the conveyance of title from the State to complainant, of unlocated and unsurveyed lands, and allow the location and survey of any of the vacant lands of the State—which I conceive to be wholly outside of the contract, and, besides, would be taking practical possession, under this and other injunctions asked, of the land-office of the State.

In Hancock vs. Walsh, Judge Woods says: "This is not a suit against the State, and does not seek to deprive her of the power of disposing of her own lands in any way; for the lands which it seeks to appropriate are not the property of the State." 3 Woods, 366.

Under the act of May 12, 1846, sec. 3952 of the Code of 1879, which was in force at the institution of this suit, it was required that "every patent for land emanating from the State, should be issued in the name, and by the authority, of the State, under the seal of the General Land Office, and shall be signed by the Governor, and countersigned by the Commissioner of the General Land Office."

In the act of 1879, denominated by counsel as the "obstruction act," it is provided, that before any certificate for land reserved by the Commissioner of the Land Office, in cases where the Commissioner has doubts, or where there is a suit to compel or restrain the Commissioner in the issuance of certificates, shall have any force or effect, the same shall be submitted to and be countersigned by the Governor of the State.

It is urged that this obstruction law must be disregarded, because passed since the institution of this suit, with a view to affect the remedies to be granted by the Court, and that it impairs the vested rights of complainant under his contract.

I am not prepared to say that complainant, under the Mercer contract, acquired any vested right, as to the forms and manner in which the title of the Republic was to pass, or be conveyed. If he did, he is remitted to the laws in force at the time of the making of the contract.

An examination of the laws of the Republic, in force at the making of the contract, fails to show any authority for the Commissioner to issue land certificates. Many other officers and boards could issue them, but not the Commissioner.

The contract itself provides for no certificates to be issued by the Commissioner.

As I view the matter, therefore, under the laws of Texas, to operate the conveyance of title emanating from the State to public lands, either by patent or certificates, the act of the Governor of the State is necessary; and the Governor is no party to this suit.

The case of Davis vs. Gray, affirming Osborne vs. United States Bank, on the subject of making, and requiring the State to be made a party, where the State is concerned, is very strong, and I feel bound to go as far as that case, but I must leave to the Supreme Court to go further, or declare the law, that the Courts of the United States can go further. Article 11, of the amendments to the Constitution of the United States. To construe it so as to allow the property of a State to be alienated, or conveyed in a suit against a subordinate official of the State, is not only to nullify the amendment, but to put the State in a worse plight than if the amendment had not been adopted; for without the amendment the State would always have her day in Court.

The complainant also asks an injunction to restrain the defendant, as Land Commissioner of the State, from issuing any further patents and certificates for any of the vacant and unlocated lands of the State beyond and outside of the Mercer colony limits to any person whatsoever, until the just demands of the complainant, arising under the Mercer contract and the public trust, created by the compact of annexation, to hold the public lands for the payment of the debts and liabilities of the Republic, are fully compensated and satisfied.

This demand involves the propositions:

That the treaty or compact of annexation created such a trust in favor of the creditors of the Republic as could be enforced in the Courts of Equity. In other words, that it contemplated that any creditor might sue the State and obtain a decree for the sale of sufficient of the public lands to satisfy his demand. I doubt if any such trust was contemplated or created, particularly in the face of the inhibition of the Constitution of the United States as to the right to sue a State in the Courts.

That a great public trust was created, that the public faith was pledged, that the State of Texas may be bound in morals and good faith, to apply the public lands as stipulated in the treaty—I agree, but I doubt the power and authority of the Circuit Court of the United States, sitting as a Court of Chancery, to enforce these obligations.

The learned solicitors for the defendant have, with great ingenuity and force, argued to the Court several propositions that I will merely advert to.

They claim that no injunction should issue in this case, as it would be a vain and useless order, so far as giving any relief to complainant is concerned. It does not seem so to me. Preventing the further waste of the trust estate; preventing further clouds from being thrown on complainant's equitable title, and preventing defendant from further obstructing complainant in the assertion of his rights, would seem considerable, valuable and effective relief.

It is further said by solicitors that complainant should be remitted to the political department of the State government for the relief his case demands. I do so remit him, but at the same time, I grant the relief (as I am bound to do), that I find he is entitled to from the Court, and the Court aids him to protect his property until the conscience of the political department is moved, and the said department can see its way clear in the premises.

It has been urged, and in fact, charged, in the answer, that many innocent persons have acquired equitable titles to lands in the limits of the Mercer Colony, and that to continue the injunction will operate a loss and hardship.

No proof is made, but, taking it to be true, there is no suggestion that any of these equitable titles are of a higher nature, or of earlier date than complainant's titles.

It shows the more forcibly the necessity for the action of the political department of the State, but shows no sufficient reason for this Court to deny complainant the relief that equity and good conscience require.

For these reasons, and many others that might be given, and well knowing that any errors that I may make, either in granting or in denying the full measure of relief, can and will be revised and corrected by the honorable, the Supreme Court of the United States, I consider it my duty to pass the accompanying decree. And it is so ordered. (Signed)

DON A. PARDEE, Judge.

DECREE.

In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin:

In Equity, No. 98—William Preston, complainant vs. W. C. Walsh, Commissioner of the General Land Office, etc., defendant.

This cause came on to be heard at this term, on the twenty-sixth day of January, 1882, and was argued by counsel, and, thereupon, upon consideration thereof, it was, and now is ordered, adjudged, and decreed as follows, namely:

First. That the complainant's allegations are found to be true and supported by the proof, and that the order and writs of injunction heretofore granted and issued in this cause, are hereby made perpetual, and the defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and all and every, his successors in office, and all his clerks, draftsmen, subordinates, agents, servants and employes, and all officers or agents, subordinates to him, the said defendant, or to any of his successors in office, or in any manner under the direction, supervision or control of him, or of any of his successors in office, be and hereby is and are restrained, prohibited and forever enjoined from issuing, or delivering, or permitting to be issued or delivered to any person or persons, or to any corporation, any certificate or certificates, patent or patents, plat or plats, for any land or lands within the boundaries of Mercer's colony, as set forth in the bill of complaint, and the exhibits therewith filed; and from any and all interference with, or infringement of, or upon the land grant or land reservation known as Mercer's colony, and from doing, or causing to be done, any act or thing whereby there may issue any patent, certificate, plat or grant of any land within the boundaries of said Mercer's colony, as defined and set forth in the bill of complaint and the exhibits filed, and as set forth in the contract made on the twenty-ninth of January, 1844, by and between the Republic of Texas, by Sam. Houston, President thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas—except to the complainant, William Preston, as chief agent of the Texas Association, or his successors or assigns, or to such person or persons as he or his successors may, in writing, direct.

And it is further ordered, adjudged and decreed, that the defendant,

William C. Walsh, Commissioner of the General Land Office of the State of Texas, and each and every his successors in office, and all his or their servants, employes, agents, clerks, draftsmen, surveyors, deputies and subordinates, each and every one be, and the same are enjoined, restrained, and prohibited from hindering, obstructing, preventing or delaying the said William Preston, his agents, attorneys, employes, or the successors or assigns of said Preston and their agents, attorneys, or employes in the surveying, selecting, platting, recording, entering or claiming any and all lands lying within the limits and boundaries of the so-called Mercer colony, as set forth in the bill of complaint and the exhibits therewith filed, and the said defendant and his successors in office, and his and their agents and subordinates, are enjoined from hindering, obstructing, preventing or delaying the said Preston, or his successors or assigns, or the Texas Land Association, from performing and completing and perfecting, all and singular, the several conditions, duties, obligations and acts devolving upon the said Preston, or said Association, under the terms and stipulations of the colonization contract set forth in the bill of complaint in this cause, and in the exhibits filed with the said bill of complaint; provided, that this decree and the injunction herein shall not be held, nor intended, to affect any lands appropriated or set apart by the act of Congress of the Republic, entitled "An Act appropriating certain lands for the establishment of a general system of education," approved January 26, 1839, and which lands were legally located, surveyed and appropriated for a State University, prior to January 29, 1844, the date of the Mercer colonization contract. And it is further ordered and adjudged that the defendant do pay all the costs herein incurred, the clerk to tax the same, and that proper process issue therefor.

Decree rendered January 25, 1882, and signed January 26, 1882.

(Signed) DON A. PARDEE, Judge.

True copy from the minutes of the Court.

Test, with seal, this 27th January, 1882:

[SEAL.] M. HOPKINS,

Clerk United States Circuit Court, Austin, Texas.

X

109-297

OFFICE SUPREME COURT U. S.
FILED
MAR 5 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

WILLIAM C. WALSH,
Commissioner of the General Land Office of the State of Texas,
APPELLANT,

No. 863.] *vs.*

WILLIAM PRESTON,
APPELLEE.

Appeal from Circuit Court of the United States for the Western District of Texas. In Equity.

BRIEF OF A. J. PEELER, COUNSEL FOR APPELLANT.

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BRIEF OF A. J. PEELER, COUNSEL FOR APPELLANT.

STATEMENT OF CASE.

This suit grows out of contract, executed January 29, 1844, between the Republic of Texas and one Mercer. To understand the questions involved, it is necessary to refer in outset to legislation of the Republic under which this contract was made; and as it is a long document, unbroken by sections, to analyze with care its more material provisions so as to bring to view the respective rights and obligations of the parties. It is also desirable, if not indispensable, owing to the nature of this case and the ground covered by the assignments of error, to present somewhat more fully than ordinarily required the pleadings, that the court may at once the better appreciate the real points in controversy as they arise upon the record. For the convenience of the court and counsel we have taken the pains to prepare and submit herewith an appendix containing all the laws of the Republic and State of Texas, and of the Congress of the United States, regarded as having any impor-

tant bearing upon the subject, the debates of the Constitutional Convention of Texas of 1845, in which the Mercer and similar colonial contracts were discussed, the contract between the Republic and Mercer, which has been subdivided and subdivisions numbered, so as to afford greater facility in referring thereto, and the articles of association between Mercer and associates. As an attentive examination of these will be necessary, having them thus at hand, it is hoped the labors of the court will be lessened:

Laws of Republic Under which Contract was Made.—The first act upon subject was passed February 4, 1841, and is entitled "*An act granting land to emigrants.*" (App. 1; Hartley, 624.) The object of this act was twofold;.(1) to *give* lands to emigrants *independent of any colonization scheme, and without confining them to any particular territory*; and (2) to authorize President to contract with Peters and others, upon *certain conditions and for a regulated compensation in land, to introduce from abroad and actually settle emigrant families* on vacant public domain, within certain boundaries, to be designated by the President; contractors to commence settlement within one year, and introduce number of families specified in contract within three years from its date; contract to be drawn by Secretary of State, and to contain nothing contrary to general principles of act, or Constitution of Republic. Previous valid locations to be unaffected by it. Following provisions of this act show terms and conditions upon which contract was to be made, and were to govern rights and obligations of parties thereto and of settlers upon the land:

SEC. 7. *Be it further enacted*, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family comprehended in said contract, nor more than three hundred and twenty acres to a single man over the age of seventeen years.

SEC. 8. *Be it further enacted*, That no individual contract made between any contractor and the families or single persons which he may introduce, for a portion of the land to which respectively they may be entitled, by way of recompense for passage, expense of transportation, removal or otherwise, shall be binding, if such contract embrace more than one-half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land; nor shall any emigrant be entitled to any land, or receive a title for such land, until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation and under good fence at least fifteen acres on the tract which he may have received.

SEC. 9. *Be it further enacted*, That all the expenses attending the selection

of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them: *Provided, however*, That this provision shall not release the colonist from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done, without a sale of their land: *And further*, The President may donate to every settlement of one hundred families, made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

SEC. 10. *Be it further enacted*, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families, and in the same ratio of half sections for every hundred single men introduced and settled, it being understood that no fractional number less than one hundred will be allowed any premium.

SEC. 11. *Be it further enacted*, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; *And further*, All fees incidental to the issue of patents for lands acquired under the provisions of this law shall be paid to the Commissioner of the General Land Office, for the use and benefit of the public treasury.

SEC. 12. *Be it further enacted*, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce, who shall be entitled to their respective quotas of land, agreeable to the provisions of this law.

SEC. 13. *Be it further enacted*, That the contractors shall be required to have one-third of the whole number of the families and single persons for which they contract, within the limits of the Republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same; and it shall be the duty of the Secretary of State forthwith, after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture, unless the President, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them for the number of families which they are bound to introduce. And this act shall take effect from and after its passage.

By amendatory act of February 5, 1842, (App. 3; Hartley, 645) the President was authorized to contract with other companies organized for like purposes, all rights accruing to and all duties, obligations and conditions imposed upon Peters and others to be extended to such other companies. Afterwards, January 16, 1843, a joint resolution was adopted, which, after reciting the making of several contracts with Peters and others, and declaring that it had been deemed expedient to modify some of the provisions of the

act of February 4, 1841, and the said contracts, and to extend some of the privileges therein granted, authorizes and requires the President to make such modifications of said contract, or to make such further contract or contracts with the grantees named in the act of February 4, 1841, as should be deemed by him for the benefit of the Republic, not inconsistent with the provisions of said act. Said resolution contains the following:

Provided, however, That he [the President] shall have full power and authority to extend the time to the grantees named in the aforesaid act [act of February 4, 1841] or to their assigns or legal representatives, for the introduction and settlement of emigrants in this Republic, to a period not exceeding five years from the first day of July next, and that he shall be authorized to prescribe the limits within which the grantees or their assigns or legal representatives shall be permitted to introduce and settle any number of families, not exceeding ten thousand, within the whole time limited; that he shall be authorized to make the title and conveyance of each section of six hundred and forty acres of land which has been or shall be acquired under any contract made or to be made by the President of this Republic with the grantees, or their assigns or legal representatives, to the said grantees, or their assigns or legal representatives, direct; *Provided,* That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid, and shall be required to settle or receive such lots only as are of fair quality for agricultural purposes, and not too far situated in the interior of a prairie for such purposes; and whenever they shall have completed the surveys of any number of sections, and built a corresponding number of small comfortable houses, or cabins, of logs or other materials, thereon, and placed families therein, they shall receive a title from this Government to one section of six hundred and forty acres for each family so introduced and settled, and shall be required to immediately convey to the legal representative of said family not less than one hundred and sixty, nor more than six hundred and forty, acres of said land, conditioned that said family shall remain upon said land so conveyed, and enclose with fence and cultivate fifteen acres, for at least three years, and in default thereof shall forfeit the same to this Republic;

Provided, further, That in the contract to be made by the President of this Republic with the said grantees, or with their assigns or legal representatives, they shall be required to settle each year, within the territory prescribed or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed, and in default of introducing and settling such number of families their contract shall be forfeited;

Provided, however, That they shall be allowed to introduce and settle any number of families, not exceeding ten thousand in all, on the same terms and conditions; and,

Provided, further, That they shall be permitted to settle all the sections within any limits prescribed or to be prescribed, and not located previous to

the time of defining such limits, and that for every alternate section of six hundred and forty acres which shall be conveyed to them they shall pay into the treasury of this Republic twelve dollars in specie, on receiving the title from the Government; and,

Provided, further, That in case of forfeiture the party shall only be affected prospectively, anything in the aforesaid act, or contracts, to the contrary notwithstanding. (App. 4, Hartley, 649.)

When the Eighth Congress met at Washington, the then capital of the Republic, December 4, 1843, so general had become the dissatisfaction and so great the disappointment of the people with the above mentioned laws that at an early day in the session bills were introduced in both houses to take from the President all authority to make colonization contracts, and to forfeit such as had already been made, where their conditions had not been strictly complied with. An act for this purpose passed the Senate December 28, 1843, and the House January 2, 1844. It was sent to President Houston, who afterwards made this contract with Mercer, for approval. He vetoed and returned it to the Senate, in which it originated. The Senate passed it over his veto by a vote of nine yeas to three nays January 25, 1844. The House also passed it over his veto by a vote of thirty-five yeas to three nays January 30, 1844. (App. 23. See House J., 391; Senate J., 172.)

The strong feeling of the people against the making of any more such contracts, and their determination to repeal all laws authorizing them, so promptly and emphatically expressed through the action of their representatives, was not only, as it necessarily must have been, well known officially and personally to President Houston, but to Mercer, who was in Washington at the time, and signed said contract *only the day before the said law would go into effect, and just in time to escape the consequences of its evident passage over the President's veto.*

Contract.—This, as before stated, bears date January 29, 1844. (Rec. 91; App. 1.) Houston, President of the Republic, is styled party of first part, and Mercer, and such associates as he shall choose, party of second part. After referring to Acts of February 4, 1841, and February 5, 1842, and Joint Resolution of January 16, 1843, *supra*, and to authority conferred by said resolution on President to make such further contract or contracts with grantees named in original Act of February 4, 1841, or with their assigns or legal representatives, as should be deemed by him for benefit of Republic, not inconsistent with provisions of said Act, it recites that

Mercer was legal representative of a part of said grantees, one of whom died in London prior to passage of Act of February 4, 1841, and five others of whom assigned to him, among others, their interests in said Act and all contracts made pursuant thereto, by assignment, dated in London, September 22, 1841, and that Mercer desired to make a new contract in behalf of himself and others, his associates, to be united in one company or association for purpose of colonizing part of the unappropriated lands of the Republic.

The emigrants to be introduced by Mercer were to be settled within limits described in contract, or within such other limits as might thereafter be prescribed by President. (App. pp. 6–7.) The colony contains approximately 6098 square miles, or about 3,902,720 acres. All lands previously located within colony, according to valid laws, are excepted from contract. All lands lying within colony boundaries not legally located prior to contract were to be held subject to settlement as therein provided, and all lands not located by emigrant families authorized by contract to be introduced and settled thereon, or not appropriated under the provisions of contract within five years from its date, were to revert to Republic.

It was agreed that until Mercer and associates should obtain act of incorporation from Republic, they should appoint, by a majority of their number in interest, in such mode and by such title or denomination as a majority in interest of association should agree on, in some instrument of writing or article of agreement and association, to be drawn up and subscribed by such majority, some one or more person or persons to act under a common name to be assumed by the said association, and under such instrument of writing to invest such person or persons with full authority as their trustee or trustees to receive and hold for their benefit and on their behalf, according to such rules as they, or a majority in interest of their company or association, might prescribe in writing from time to time, the titles and conveyances of such lands, bonds, obligations, notes or money as they should agree by a majority in interest of their number to confide to the keeping or use of said trustee or trustees.

Same—Conditions to be Performed by Mercer and Associates.—Mercer, for himself, his associates, his and their heirs, executors, administrators and assigns, covenanted and agreed:

1. To introduce and settle in colony within five years from date of contract, agreeably to Acts of February 4, 1841, and February

5, 1842, and the Joint Resolution of January 16, 1843, and according to contract, as many emigrant families as they could settle therein, to be not less than one hundred for each year of said term. To settle 100 families prior to May 1, 1845, or all right to proceed further under contract to cease and determine from moment of default, the default not to operate retrospectively on interests previously acquired. In like manner, and upon failure to be followed with like consequences, to introduce and settle before expiration of two years from date of contract, to-wit, by January 29, 1846, 250 families, and during the remaining three years 150 additional families. Each family was defined in contract to consist either (1) of a man and wife; or (2) of a widower and two or more children—if males, under the age of seventeen years, if females, unmarried; or (3) of a widow and two or more children, unless one be a son above seventeen years of age, in which case one child should suffice; or (4) of two single men over the age of seventeen years.

2. To cause the unappropriated lands within colony limits to be surveyed, as needed for purposes of settlement, in sections of 640 acres, or at their option into half sections of 320 acres. To make surveys and divide colony lands into sections and half sections except when rendered impracticable on account of streams or by reason of prior surveys, in which event fractional sections of greater or less than one-half might be made, and quantity therein contained computed and taken into account as entire sections.

3. To cause correct plats and copies of the field notes of all such surveys to be made, denoting therein the ranges and number of the section or half sections and the fractional sections exceeding or falling short of one-half section, and to return same or correct copy thereof to General Land Office of Republic, so that as they became entitled to any section or number of sections they could be marked on said plat.

4. To cause to be built, from time to time as needed, such number of log cabins or small houses constructed of other materials as circumstances should require for comfortable accommodation of each family introduced and settled.

5. To cause each male emigrant of seventeen years or upwards to be supplied and bring with him a good rifle, yager or musket, and a sufficient supply of ammunition.

6. To keep on hand at all times, in some convenient place of deposit, such quantity of prime ammunition as would supply to each

male emigrant of seventeen years or upwards settled by them not less than 100 rounds.

7. To exhibit, whenever they desired a conveyance to any land, to the Commissioner of the General Land Office or other proper officer, evidence of having surveyed the portion of the land to which such conveyance was desired, and to pay the expenses of such conveyance as provided by the act of February 4, 1841. And before being entitled to receive any conveyance, to exhibit to said Commissioner a certificate under oath, subscribed by two witnesses and certified by some person qualified by laws of Texas to administer oaths, that they had caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which by the contract they were to convey to each family or the several families respectively, and that they had actually settled a family or several families therein.

8. To convey to each emigrant family settled by them not less than 160 acres out of each section of 640 acres, and where they made the conveyance instead of requesting the Republic to make it directly to the family, as they might do, to insert in deed clause of defeasance requiring each family to enclose with good fence and cultivate at least fifteen acres of land so conveyed, and to reside on same for three years, or forfeit title to the Republic.

9. To pay for each alternate or reserved section belonging to Republic (if they desired to settle and purchase same) into the public treasury, and obtain Treasurer's or other proper officer's receipt therefor, $12 in specie, and in addition thereto, and as further consideration, to deliver up for cancelment bonds, promissory notes, or other audited liabilities of Republic, to amount of $640, and before getting conveyance to furnish due evidence that for every section or fractional part of a section or sections amounting to 640 acres of the reserved alternate sections belonging to the Republic (not including the ten premium sections and the two sections for public worship and schools) an emigrant family had been introduced and settled.

10. To cause, until they obtained act of incorporation, certified copies, to be attested according to such evidence as was prescribed by laws of Republic for foreign conveyances of land when such land was conveyed by indentures or contracts made without limits of Republic, to be transmitted to Department of State or other proper department of government, for safe keeping and reference,

of all instruments of writing requesting conveyances to be made in lieu of others which had been surrendered.

11. To transmit to Department of State, within six months from date of contract, and once within every six months thereafter, until act of incorporation was obtained, list of copartners of association, and statement of share or shares of each in stock or property of association, and of common name or title assumed by them or majority of them in interest.

Same—What Republic Was to Do.—1. To hold *unlocated* lands within colony *until end of five years* from date of contract, for benefit of both parties. But lands within colony not settled by emigrant families or appropriated under provisions of contract *within five years from date of contract were to revert to Republic*. Right on part of Mercer and associates to proceed further under contract to instantly *cease and determine* upon the occurrence of either of following defaults: (1) If they failed to introduce and settle, according to tenor of contract, 100 families prior to May 1, 1845. (2) If before expiration of two years (January 29, 1846) they failed to introduce and settle 250 families. (3) If they failed to introduce and settle 150 families for remaining three years. Such default not to operate otherwise than prospectively, in relation to Mercer and associates, or any emigrant families *actually settled*, or any person or persons claiming by, through or under them or any of them.

2. To allow Mercer and associates to settle emigrants within colony until they should settle therein as many families as would entitle them to each and every alternate section of 640 acres, or each and every half section of 320 acres included, as well as to all other sections therein, according to terms of contract.

3. To convey to Mercer and associates, or their legal representatives, upon conditions as hereinafter stated, one section of 640 or two half sections of 320 acres for each family introduced and settled by them on lands set apart for colonization, but each alternate section of 640 or half section of 320 was to be reserved to the Republic, subject to be purchased or not by Mercer and associates.

4. To make full title, in usual mode, to Mercer and associates for each and every section, half section or other fractional part of a section, to which they might become entitled under provisions of contract, as soon and whenever they should exhibit to Commissioner of the General Land Office or other proper officer, in manner and

form as prescribed in contract, evidence of having surveyed the portion of the land for which such conveyance was desired, and that there were comfortable small houses or cabins erected thereon and families residing therein, who had been settled thereon by them or their legal representatives, and upon paying the expenses of such conveyance, as provided by act of February 4, 1841, or, if requested, to convey directly to families number of acres which Mercer and associates had agreed to give them, and residue of each 640 acres or any fractional part thereof, after families had been satisfied, directly to Mercer and associates or legal representatives. Each family to receive not less than 160 acres. Correct plats and copies of field notes of all surveys were to be made, denoting therein the ranges and numbers of the sections, half sections and fractional sections, and the same or correct copy thereof returned to the Land Office, so that as Mercer and associates became entitled to any section or number of sections they should be marked on said plat. And it was not until Mercer and associates exhibited to the Commissioner of the General Land Office a certificate under oath, subscribed by two witnesses and certified by some person qualified by the laws of Texas to administer an oath, that Mercer and associates or their legal representatives had caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which, by the contract, Mercer and associates were to convey to each family or the several families respectively, and had actually settled a family or several families therein, that they were to receive a conveyance from the Republic for a section of 640 acres for each of the families certified to in such certificate. Nor was any settler under seventeen years when introduced to be entitled to lands; nor was any family to be named as a settler in more than one certificate, so as to entitle Mercer and associates to more than one section of 640 acres of land on their account. Correct records of all such conveyances were to be kept in the General Land Office.

5. To allow Mercer and associates, as further recompense for settling families as provided in contract, a premium of ten sections of 640 or twenty sections of 320 acres of land for each and every 100 families introduced and settled by them. No premium for any fractional number of 100 families was allowed. Whenever due evidence was adduced that Mercer and associates, or legal representatives, had settled 100 families as aforesaid, to allow Mercer and

associates to select said premium sections, within the colony limits, from among those reserved to the Republic, to be, where practicable, of continuous alternate sections or fractional parts of sections equivalent in extent to ten sections of 640 acres each.

6. To allow Mercer and associates to settle and purchase the alternate or reserved sections surveyed for and reserved to Republic, upon paying for each into the treasury, and obtaining receipt therefor, sum of $12, and, in addition to said sum, delivering for cancellation bonds, promisory notes, or other audited liabilities of Republic, to amount of $640, and, when this was done, to make title to each alternate section so purchased. But before any such conveyance should be made Mercer and associates were to furnish due evidence that for every section or fractional parts of a section or sections amounting to 640 acres of said reserved sections (not comprehended in the ten premium sections) they had introduced and settled an emigrant family as provided by contract with respect to other sections not reserved. If desired, the title to that portion of the reserved section which Mercer and associates had agreed to give to the family would be made directly to the family, and conveyance of residue of each alternate section or balance remaining of the 640 acres of fractional sections would be conveyed directly to Mercer and associates or their legal representatives.

To obviate any misunderstanding as to terms upon which Mercer and associates might purchase and settle these alternate reserved sections, it is stated they might purchase and settle any number of families on said sections, and that the like compensation or recompense in land for every 100 families settled thereon should be made to each settlement as in the case of the introduction and settlement of the same number of families upon any other sections not reserved, and that for such premium sections they were not to pay more than $12 in specie, required by the joint resolution of January 16, 1843.

Pleadings--Original Bill.—This was filed March 6, 1875, by George Hancock as a citizen of Kentucky against J. J. Groos *as Commissioner of the General Land Office of the State of Texas* and a citizen of said State. (Rec. 1.) It alleges:

1. Execution of contract, and makes same an exhibit: (Rec. 2.)

2. After making contract Mercer immediately entered into possession of lands in colony, and by himself, his agents and colonists took possession, conveyed and occupied same in conformity with

contract, and managed; controlled and had jurisdiction as proprietors of colonial reservation. (Rec. 2.)

3. Mercer and associates paid more than $20,000, and gave time, labor and services to establish colony in good faith; introduced and actually settled within five years from date of contract, and in accordance with its terms, not less than one hundred families within each and every year of said period; and generally "*that the said Charles F. Mercer did well and truly perform all the covenants made and entered into by him in said contract which were to be performed by him and his assigns and legal representatives.*" (Rec. 2.)

4. Between date of contract and its expiration Mercer and associates exhibited to Commissioner of Land Office proper evidence that they had settled more than 200 families first year of term and more than 1500 other families before January 29, 1849; that amongst archives of State as part of records of Land Office, under control of defendant, was report [which is made an exhibit] verified by signatures of Rowlett, Pillons and Bean, containing true and acurate list of emigrants introduced and settled, making 119 families, which was received without objection, admitted to record, and stands of record as evidence of lands to which Mercer and associates were entitled under contract. (Rec. 3–4.)

5. Mercer and said association, though greatly obstructed by the agents and officers of the Republic, did, within the period of five years from date of contract, introduce and settle 1256 families, according to terms of contract, and in every particular well and truly perform all the covenants in the contract which Mercer and his associates were bound to perform, according to its tenor and true meaning; that by reason of the introduction and settlement of said 1256 families Mercer and associates became entitled to 1256 sections and 120 sections of premium lands, making in all 1376 sections of land of 640 acres; that full evidence was adduced, and is offered in the archives of the Government, of the introduction and settlement, by Mercer and those claiming and holding under him, of these 1256 families prior to January 29, 1849; that the whole surveys were granted to these 1256 colonists without regard to rights of Mercer or "Texas Association," and in disregard of duty and official trust imposed upon predecessors of defendant; makes an exhibit of certified copy from Land Office of report signed by Crockett as commissioner, under act of February 2, 1850, containing 1256 names, with the quantity of land given to each. (Rec. 6.)

6. As explanatory of right of Hancock to maintain suit in his own name individually, alleges that a joint stock association, styled "Texas Association," was organized and reported to government of Texas; that by act of a majority of their number in interest, they assumed said name in articles of agreement and association (Rec. 143), investing Mercer with full powers to act as trustee and chief agent; that Mercer acted as such until 1852, when he sold and assigned his interest in property of association, for value received, to complainant Hancock, who was duly appointed trustee and chief agent in place of Mercer, and with all his powers, and who entered upon trust, accepted same, and continued to act up to time of filing bill.

7. That shareholders are numerous, and as far as complainant is informed, beyond jurisdiction of court, and it would be impracticable to make them parties. (Rec. 5).

8. Referring to provisions of contract for reservation of lands within colony for five years, alleges that the Commissioner of Land Office not long after date of contract, not regarding its provisions, did not hold same free from future locations and claims, but "proceeded to issue certificates and receive field notes and surveys of lands within said limits, to and from all persons holding general certificates of location, and to issue patents therefor, and that the predecessors of the said John J. Groos and the said defendant have continued and he still continues to issue patents upon surveys made within said limits, in violation of said contract." (Rec. 5.)

9. That defendant, though specially requested, refused to grant any patents to Hancock or the "Texas Association," as compensation for labor and expense incurred in colonizing lands, or to allow any surveys or give conveyances to perfect title as stipulated in contract. (Rec. 6.)

10. That Republic at date of contract was seized in sovereign demesne of all lands within colony, and by statutes inviting colonial contracts held out to the world a solemn promise that in all such contracts an immediate vested equitable estate should pass to and vest in contractor, subject, however, to be divested by the nonperformance of conditions annexed to grant, so that the government was left with only legal estate in fee and reversion in fee after lapse of five years if conditions annexed were not fulfilled; that said statutes and contract created a trust, the State only retaining legal title, and made it duty of officers of State to convey

legal title to contractor and colonist when proper evidence of introduction and settlement of emigrants was offered, as required by contract; that this vested right could only be lost or forfeited by non-performance of conditions, to be legally ascertained and lawfully declared. (Rec. 6–7.)

11. That not long after execution of contract many turbulent adventurers and lawless men entered the country, wrongfully entered upon and occupied lands in colony; that Mercer and associates applied to government for redress in vain; that legislation was procured which greatly hindered Mercer in the exact and peaceful performance of each and every detail and particular of contract; that Mercer caused external lines of colony to be run and map thereof to be returned to government, a copy of which is made an exhibit (Rec. 112); that they caused other surveys to be made, for which, and for plats, maps, advertisements, books, etc., they incurred expense of more than $10,000; that external lines would have been more completely surveyed but for obstructions by officers of government, and more particularly by ordinance annexed to the Constitution of 1845, which denounced colonial contracts as unconstitutional and fraudulent, spread alarm amongst colonists, and caused them to abandon and disclaim privity of estate with Mercer, and greatly obstructed Mercer in faithful fulfillment of contract.

12. As an excuse for delay and laches of complainant in instituting suit, alleges that Hancock, not long after he bought Mercer's interest, visited Texas; that other colonial contracts were under discussion in Legislature and pending in courts, with prospect that all laws tending to impair them would be declared void; that he was advised that preparation of suits would be costly; that he was further advised by his associates to wait the pleasure of the State, and in confidence in its justice he did await the action of its officers, believing that the justice measured out to Peters' colony would be meted out to Mercer's colony; that he thus delayed until 1858, when Supreme Court decided Mercer's contract constitutional and valid; that soon after war between States prevented complainant as an alien enemy from pursuing remedies; that afterwards State of Texas remained under provisional government for a long time and in unsettled condition; that he had constantly and urgently petitioned Legislature for redress, but received no response. (Rec. 7–8.)

13. That there are still more than 1,000,000 acres of land va-

cant, unlocated and subject to terms of contract within limits of colony, which should in equity be subjected to the specific performance of the provisions thereof. (Rec. 8.)

14. That it is duty of Commissioner of Land Office under laws of State to issue patents to complainant, and prays for an injunction against Groos, and his successors in office, as Commissioner of the General Land Office of the State of Texas, "from further interference with or infringement of said land grant or land reservation, the limits whereof are set forth in said contract as in premises stated, known as Mercer's colony, and from allowing any location or survey of the lands lying within the same which are not yet patented; and from issuing or permitting to be issued any patent or grant of lands within said reservation, except to your orator and Texas Association; and from doing or suffering to be done any act whereby such lands may be located, surveyed or patented to any other person or persons than to your orator, to be held as set forth in said contract and stated in the premises," and for general relief. (Rec. 9–10.)

Same—Demurrer to Original Bill.—Defendant filed demurrer April 7, 1875 (Rec. 7), but of this no notice need be taken, as it was not set down for argument, and the same grounds were embraced in demurrer afterwards filed April 16, 1879, which was argued and disposed of. (Rec. 10.)

Same—Bill of Revivor.—Hancock died August 27, 1875, and a bill of revivor was filed by Preston, present complainant, September 8, 1875. In this bill it is alleged that before departing his life Hancock made his will, appointing Preston executor of his estate, and enjoined upon him to revive the suit; that the will was probated in Kentucky by a court of competent jurisdiction of that State; and letters testamentary issued from said court to said Preston, on or about October 21, 1875. (Rec. 12.)

Same—Bill of Revivor and Supplement.—Afterwards defendant Groos died, and Walsh, present defendant, succeeded him as Commissioner, whereupon Preston filed, April 12, 1879, what is styled "Bill of revivor and supplement." (Rec. 15). This bill states—

1. That Walsh had been notified in writing of rights of complainant as trustee of "Texas Association," and not to issue certificates or patents to lands within colony, but he disregarded notice,

and threatened to issue certificates and patents to persons not claiming under or in privity with Mercer.

2. That complainant demanded of Walsh certificates for 1376 sections of land, or an equivalent quantity in sections and half sections, which Walsh refused to issue or deliver. Makes copy of notice an exhibit. (Rec. 110.)

3. That by terms of association between Mercer and associates, Mercer was to remain chief agent of association; that notice of organization of association was given to Secretary of State of Republic, by written report from Bonham, Fannin county, Texas, dated July 11, 1844, and was received and filed without objection, copy of which is made an exhibit. (Rec. 89.)

4. That under agreement between Mercer and stockholders of "Texas Association," Mercer's interest in grant was divided into 100 shares, 55 of which were retained by Mercer, and the rest issued to associates to obtain means, etc.; that it was agreed Mercer should remain chief agent of association, and that his powers should be plenary; that he should provide one or more suitable persons to act as chief agent or agents in the event of his sickness, inability or disinclination further to act, and that such successor should have all the powers which Mercer had, including the power to appoint successor or successors. (Rec. 16.)

5. That under said agreement certificates of shares were issued by Mercer to each shareholder, printed form of which certificates is made an exhibit. (Rec. 106.) That the agreement between Mercer and associates was in the form of an agreement signed by Mercer and each shareholder, each shareholder signing an agreement identical in form and provisions with a printed form which is made an exhibit. (Rec. 143.)

6. *That this is the fundamental agreement of association under which Mercer and associates introduced and settled colonists, took possession of and derived their titles to lands, and that it has never been abrogated, but is still in full force.*

7. That in 1852, when Mercer sold his interest in contract to Hancock, Hancock was appointed and acted, and was continuously recognized by association as chief agent and trustee to his death in 1875; that Hancock, by the eighth clause of his will, in execution of the powers conferred on him as chief agent of "Texas Association," appointed Preston as chief agent and trustee, to maintain and prosecute claim, or any suit based thereon, and to revive same, and

do all things which Hancock could do under said agreement and contract, and bequeathed and devised to Preston upon the trust set forth in said will all his estate, stock and property in said "Texas Association," a copy of which will is made an exhibit. (Rec. 7, 8, 107.)

8. That Preston entered upon office as chief agent, etc., and has since acted and been recognized as such by association and by members thereof; that by said will Preston has a large and controlling interest in association; that association has never been incorporated; that no act or charter of incorporation had been granted (Rec 18);

9. That Mercer, before making contract with Republic, had been an original associate in Peters' colony grant, and in the political controversies of the times many objections were falsely made against this and other contracts; *that in 1845 attempts were made in the convention formed to make a Constitution preparatory to the admission of Texas into the Union to declare colonial grants null and void for fraud, unconstitutionality and non-performance of conditions; that these attempts failed because such a declaration would result in rejection of the proposed annexation; that the ordinance attached to Constitution required suits to be brought; that it was the intention of Convention not to forfeit contracts, but to leave rights of parties to judicial determination; that it was left to the Legislature of Texas to provide method of determining forfeiture; that Legislature has never done this, and that contract has never been forfeited.* (Rec. 18, 19.)

10. That Mercer, Hancock, and "Texas Association" have made repeated applications to Legislature to pass laws to effectuate constitutional provision, and to admit them to the courts to assert their rights; that propositions were received, discussed and referred to committees, but Legislature in each and every instance, after *lulling and deluding* the memorialist into hope and belief that a law would be passed as directed by the Constitution, failed and refused, and still fails and refuses, to pass such law. (Rec. 19.)

11. That the articles of annexation between Republic of Texas and United States provided that the vacant and unappropriated lands within Republic should be applied to payment of its debts and liabilities; *that Mercer's contract was at that time one of such liabilities.* (Rec. 19–20.)

12. That Mercer and associates have never abandoned, renounced or failed to assert their rights under contract, but have in all ways open to them publicly and notoriously asserted its validity and the

performance of its conditions, and their rights and claims under it. (Rec. 20.)

13. That the act of February 3, 1845, requiring Mercer and associates to actually survey and mark the lines of the colony lands by April 1, 1845, was in derogation of contract, but Mercer, notwithstanding great difficulty and expense, and the unconscionably short time allowed, did *actually survey and mark said colony lines before April 1, 1845.* (Rec. 20.)

Same—Motion for Injunction Pendente Lite.—On April 12, 1879, complainant filed motion for preliminary injunction. (Rec. 22.)

Same—Demurrer of Defendant.—Filed April 16, 1879. (Rec. 23.) It adopts grounds of demurrer previously filed by defendant Groos, which were in substance:

1. That the suit was in effect a suit against the State of Texas, seeking to deprive said State of the right of disposing, in its own way, of its public lands.

2. That complainant could only obtain relief through the political department, the matters complained of not being subjects of judicial cognizance.

3. That the case made by complainant entitles him to no discovery or relief against defendant.

4. That by lapse of time and laches complainant had forfeited all right to obtain relief.

To which were added the further grounds:

1. That defendant is an executive officer, elected, bonded and sworn to obey the laws of the State of Texas, his duties being thereby prescribed, and that the bill does not show that he has violated or refused to obey said laws under which he holds his office as Commissioner.

2. That the bill is not sworn to or verified by affidavit or proof of the facts.

3. That bill shows upon its face that defendant could not issue the certificates prayed for nor refrain from patenting the lands without violating official duty.

4. That bill shows upon face that no injury can accrue to complainant pending the suit.

5. That as an executive officer of the State, defendant could not be legally commanded or restrained as sought by the bill.

6. That bill shows upon face that defendant cannot act in the

matter complained of without exercise of official discretion, for which reason injunction would not lie against him.

7. That the bill shows upon face that the issuance of, or refusal to issue, certificates or patents within limits of colony involve exercise of discretion and are not mere ministerial acts.

Same—Demurrer Overruled and Injunction Pendente Lite Granted.—His Honor Judge Woods (now Mr. Justice Woods of this Court) overruled each of the grounds of the demurrer, and on April 21, 1879, awarded an injunction. His opinion (Rec. 383) will also be found in full in Appendix, 109. The order awarding injunction directs issuance of writ to *Walsh as Commissioner of the General Land Office of the State of Texas*, his successors, clerks, agents, servants, etc., enjoining him and them:

1. From issuing or delivering, or causing to be issued or delivered, to any person or persons or corporation any plat or plats, with a view of making locations in said colony limits, certificate or certificates, patent or patents, for any land or lands within boundaries of Mercer's colony, as set forth in bill of complaint and exhibits therewith filed and therein defined.

2. From further interference with, or infringement of, land grant or land reservation known as Mercer's colony.

3. From doing, or causing to be done, any act or thing whereby there may issue any patent, certificate or grant of any land within boundaries of Mercer's colony, as defined and set forth in bill and exhibits and contract of January 29, 1844, between the Republic of Texas, by Houston, President, and Mercer, *except to complainant, William Preston*, until final hearing of cause. (Rec. 24–25).

Same—Answer to Original Bill and Bills of Revivor and Supplement.—May 31, 1879, Walsh filed sundry pleadings, one in nature of disclaimer of any interest in suit, and asking bill be dismissed as to him. (Rec. 25.) One in nature of plea in bar, setting up judgment of District Court of Navarro county as *res adjudicata* (Rec. 26); also a motion to dissolve the injunction granted April 19, 1879 (Rec. 41), and an answer (Rec. 29). Motion was made to strike all these from files, except motion to dissolve and answer, upon ground that by filing answer others were waived (Rec. 42), but no action was ever taken on this motion. Defendant in this answer (which was sworn to) states: 1. Nature of his official duties as a sworn and bonded officer of the State, under Constitution and laws thereof, as not merely ministerial, but as involving

the exercise of discretion and judgment, and the jurisdiction and power of the court to interfere with his official action, as sought by complainant, is denied. 2. That all lands within limits of colony, except such as had been previously granted, belonged, as public domain, to State, and were open to location, and that it was his duty to issue patents therefor. 3. Denies that complainant had any interest in lands, as claimed by him, and insists that court could not proceed further as State was not a party. 4. Admits refusal to issue to complainant land certificates, and says that he had issued patents to persons not claiming in privity with Mercer, because not to have done so would have been contrary to the laws of the State and a breach of official oath and bond. 5. Insists that as to all patents issued for lands in colony complainant had full, perfect and adequate remedy at law against persons claiming same, and that court had no jurisdiction in relation thereto. 6. Alleges that there were a number of persons within colony occupying and cultivating lands held under locations made under laws of State who were prevented from obtaining patents by reason of the injunction heretofore granted, and that the suit could not be further maintained without making them parties. 7. That by reason of provisions of act of Legislature of State, of April 19, 1879, he could not issue a certificate unless approved and countersigned by the Governor, and that court could not proceed further without making the Governor a party. 8. Denies that Mercer and associates ever complied with contract in introducing and settling emigrant families, or that Mercer ever occupied, had possession of, or surveyed the lands in colony according to law. 9. Refers particularly to requirement of contract as to return of surveys, etc., to Land Office, and denies that Mercer ever at any time had any of said lands surveyed in sections, half sections, fractional sections or otherwise, or returned to the Land Office of Republic or State any maps, plots, surveys or field notes of any of said lands. 10. Says that Mercer failed to apply for act of incorporation for himself and his associates, and by such failure violated the terms of contract. 11. That Texas Association never made reports of list of copartners, and shares of stock held by each, as required by contract, except in one instance, as shown by Exhibit Q to supplemental bill. 12. That Mercer and associates never built cabins or houses for settlers as required by contract, or furnished arms and ammunition to male emigrants, or kept ammunition on deposit, as required by contract. 13. That

they never actually surveyed and marked boundaries of colony as required by joint resolution of February 3, 1845; that there is no evidence in Land Office showing that any such survey was ever made; that the map marked Exhibit E to plaintiff's supplemental bill was not made in accordance with contract and said joint resolution, and does not represent lines of colony as claimed to have been marked and surveyed by complainant, the differences being pointed out. 14. Sets up decree of the District Court of Navarro county, rendered September 25, 1845, declaring null and void the Mercer contract, and alleges that copy thereof was a short time after its rendition deposited in General Land Office, has remained on deposit until present time, and been recognized by his predecessors in office as legal, binding and final, and, as he believes, by all the other officers and departments of the State Government, and he still so regards it. 15. That he never at any time heard validity or conclusiveness of decree doubted or called in question until institution of this suit. 16. That complainant's claim accrued more than ten years before filing of original bill, and is barred by limitations; that the State of Texas has openly, notoriously and adversely to all the world claimed, occupied, used and controlled, and from time to time disposed of, vacant lands within the colony from August 27, 1845, to present time, and still claims, uses and controls same; that during all said time State has, through her officers and agents, openly and notoriously claimed, used, controlled and disposed of said lands exclusively and adversely to Mercer and his associates and those claiming under them; that if Mercer and associates and those claiming under them ever had any right to maintain a suit on their contract, it is stale and has been lost by their laches and by failure to prosecute suit within reasonable time. 17. That neither Mercer, his associates, their agents, assignees, trustees or legal representatives ever applied to Commissioner of Land Office for land certificates, as now claimed by complainant, for a period of thirty years, during whole of which time said office was open and said State was openly and adversely claiming, holding and disposing of vacant lands within colony; that during the whole of said time said Land Office recognized and treated the lands in said colony as vacant and open for settlement and location, receiving locations and issuing patents thereon to various persons, who went into open and notorious possession and occupancy of said lands, and held same adversely to the world, paying taxes thereon; that these facts were well known all the while to Mercer and associates and those claim-

ing under them, and yet they failed and neglected, for a period of thirty years, to assert their rights, if any they had, in the courts of country, without any legal, equitable or valid excuse for such laches. 18. That if State ever held the title to any of these lands in trust for Mercer and associates such trust ceased and was determined by reason of the several failures of Mercer and associates to comply with the requirements of contract, and that it was determined by decree of District Court of Navarro county declaring said contract forfeited and null and void. 19. Denies generally that Mercer and associates ever performed stipulations or requirements of contract or of laws in relation thereto, and avers, on contrary, by reason of failure and neglect so to do, they forfeited said contract and all rights thereunder. 20. Denies that Mercer and associates ever introduced and settled within five years from date of their contract 1256 families. 21. Says that paper made Exhibit B to original bill (Rec. 101) is false and fraudulent; that in fact Mercer and associates never introduced and settled as many as 100 of the families therein named, and never complied with the terms of contract up to that time. 22. Denies that Mercer and associates were hindered or prevented from performing contract by turbulent men, by the legislation of State or action of its officers, and avers that failure to perform contract was due to their own neglect. 23. Denies that Government of Texas failed to provide mode to ascertain forfeiture of contract, and refers to ordinance of Convention of August 27, 1845, and insists that if the complainant has any remedy it is at law.

Same—Amended Bill.—On leave granted (Rec. 44), was filed December 24, 1879. This bill goes over with more fullness in some respects most of the matter contained in former bills, and reaffirms truth of all charges and allegations therein contained. It is sworn to by Preston. 1. Complainant expands his case by claiming "*that all the then vacant and unappropriated lands lying within the boundaries of the Republic of Texas, and every part of all such then vacant and unappropriated lands,* became and were bound by and included within the stipulations of the annexation so as to be and the same were retained by the State of Texas, to be applied to the payment of the debts and liabilities of the Republic of Texas, and became and were and ever since have been a *trust fund and estate held in express continuing and subsisting trust for the payment of such debts and liabilities, including the liability of Mercer and his associates, and to your orator and the Texas Association.*"

(Rec. 45.) 2. He alleges that this *trust* has never been satisfied nor performed by ministerial officers charged by law with duty of executing and performing same. 3. That out of this trust of vacant and unappropriated lands State has discharged and satisfied other colonial contracts similar to Mercer's; that he believes Mercer's to be the only one unsettled. 4. That Legislature of Texas, by act of August 12, 1870, gives right to locate colonial certificates and claims upon any part of vacant public domain. 5. That at time of annexation there were 200,000,000 acres public domain outside Mercer grant. 6. That in addition to right secured by contract to lands in colony there is further security by trust created by articles of annexation on all vacant and unappropriated lands at that time. 7. That contract was protected by Constitution and laws of Republic; that there was no law when it was made providing for repeal or forfeiture of grants, and none such was ever passed prior to admission of Texas as a State; that Convention of 1845 did not declare them forfeited, and did not provide any method for forfeiture; *that Legislature of Texas has never passed any law authorizing any officer in behalf of State to seek forfeiture, or for the repeal of grant or re-annexation of lands therein to public domain, or to interfere with possession of Mercer and associates.* 8. That in violation of rights of Mercer and associates defendant and predecessors in office have issued to "numerous persons, strangers to your orator, and not claiming through or under or in privity with the rights of Mercer and his associates and assigns, certificates for land and patents for lands within the limits and boundaries of said Mercer colony, and by such wrongful and illegal acts *great numbers of innocent persons, not conscious of the injury thereby done to your orator, have been induced to pay money and render services for such certificates and patents, and to bestow labor and expend money for such certificates and patents, and expend money upon the lands pretended to be conveyed to them, and said wrong has been pursued to so great an extent that the lands within the limits of the colony now remaining and not claimed under such pretended certificates and patents are now at this time wholly inadequate to satisfy the just demands and rights of your orator and the Texas Association.* (Rec. 47.) 9. That he is very unwilling to disturb persons holding such certificates and patents, and that very great hardship would result from so doing. 10. That defendant has issued patents in violation of injunction; that this was a part of a conspiracy to obstruct

the order of the court; that as part of such conspiracy defendant and Hon. O. M. Roberts, Governor of Texas, procured certain legislation by the Legislature of Texas, whereby it was made the duty of the Governor to countersign certificates for lands issued thereafter from Land Office; that said act was approved by Roberts as Governor; that it was intended to be and has been to embarrass complainant in the assertion of his rights and impede the due and proper course of justice in this court in this cause.

11. That *a great number of persons to whom patents and certificates have been wrongfully issued by the defendant and his predecessors in office have occupied and claimed lands in the colony*, and that there is not enough unclaimed land therein to satisfy complainant's demand. 12. That the average price of lands in colony is five dollars per acre, and would now be worth that much to complainant if his certificates had not been withheld. 13. That the vacant lands as they existed at time of annexation, so far as they are now open to location, are not worth more than fifty cents per acre. 14. That right of complainant to lands in colony is very important on account of their greater value and more desirable situation, and that to give them certificates to other lands would not be adequate recompense unless a greater quantity of land was given, so as to equal in value the 1376 sections to which he is entitled in colony limits. 15. That delay and trouble of making satisfaction for rights under contract grows out of wrongful acts of defendant and predecessors in office in assuming to issue certificates and patents to persons not claiming under Mercer and associates *so as to encumber* lands and obstruct remedies. 16. That he fears he will be forced to look to trust upon other public domain and location of certificates thereon, and if this be so, ought then to have lands of equal value to be selected from the public domain subject to location and patent. 17. That section 1 of act of April 12, 1846, established Land Office and gave the Commissioner power to direct and control subordinate officers and made it his duty to perform all acts and things touching public lands of State or rights of individuals in relation thereto as might be required. 18. That section 1 of act of March 6, 1868, authorized the Commissioner to issue to persons and corporations such certificates as they might be entitled to under any general or special law of State; that under laws of State all patents for lands emanating from the government were to issue in the name and by the authority of the State of Texas, and under the seals of the State and the General

Land Office, be signed by the Governor and countersigned by the Commissioner of the General Land Office. (Rec. 52.) 19. That under Constitution and laws of Texas it was duty of Commissioner to issue to Mercer and associates land certificates and evidences of title according to contract, after receiving reports of faithful performance of same, and to cause them to be recorded among archives of State; that notwithstanding reception of reports and full performance of contract as therein reports averred, defendant and predecessors refuse to perform the duty of preparing evidences of title so that patents might emanate from government in the name and by the authority of State under seal of State and Land Office, signed by Governor and countersigned by Commissioner, as required by law; that it is duty of defendant to prepare and sign with his official signature, and authenticate with official seal, certificates to which complainant or Texas Association are entitled, to the end that they may be perfected by further official act of Governor and other officers, as by law is prescribed; that this is a plain duty prescribed by law to be performed by defendant and his successors in office; that until defendant shall first prepare, sign and seal such certificates, there is no duty or preparation, countersignature or issuance, or delivery imposed upon any other officer of State; that defendant and predecessor refused and still refuses to perform duty of signing, sealing and delivering certificates; that neither the Republic nor State of Texas, by any constitutional or legislative act, ordinance or resolution, or by any legal proceedings of any authorized officer or court of competent jurisdiction, forfeited or attempted to forfeit the grant to Mercer, and that the same has never been annulled or revoked by any act of the people or government of Texas. (Rec. 53.)

20. After seeking discovery under oath of a great many matters pertaining to contract from its inception, and with respect to archives of Land Office, complainant prays: 1. That ordinance of August 27, 1845, and all legislation and all pretended legal proceedings under their authority, so far as they impair the rights of Mercer to the land grant, or his right to receive and locate certificates thereon and obtain patents thereto, be decreed null and void, as contrary to Section 10, Article 1, of the Constitution of the United States. 2. For an injunction against defendant and successors in office, etc., to enjoin him and them from doing, or causing or permitting to be done, any act or thing whereby there may issue any certificate, patent, patents, grant, survey or location "of any

lands within and of the public domain of the State of Texas beyond and outside the limits of the colonial grant to Mercer, as set forth in the original bill of complaint and the exhibits therewith, to any person or persons or corporation, except to the complainant." 3. To enjoin defendant from diminishing or impairing trust lands secured for payment and discharge of debts and liabilities of Republic of Texas by any sale, grant or location of any certificate, survey or patent, until the claim of complainant and Texas Association has been satisfied by delivery to complainant of the number and amount of land certificates to which he is entitled. 4. That injunction granted April 21, 1879, be perpetuated. 5. That defendant, as Commissioner of the General Land Office of the State of Texas, his successors, etc., be directed, ordered and compelled, by mandatory injunction, to refrain from longer withholding from complainant certificates for location of land to which complainant is legally and equitably entitled under Mercer's contract. 6. From further refusing to execute and deliver certificates for land to which complainant may be decreed to be entitled on final hearing. 7. That if on final hearing it appears from the proofs that lands in colony free from occupancy or claims of persons not in privity with Mercer's grant are not sufficient to satisfy his claim, that it shall be decreed that complainant shall receive certificates to lands of equal value to those to which he is entitled, "by way of recompense" for lands wrongfully alienated or patented by mistake within boundaries of colony. Adopts prayers of former bills and prays for general relief.

Same—Defendant's Amended Answer.—In granting leave to complainant to file amended bill it was ordered, if bill was filed before January rules, 1880, that defendant should appear by plea, answer or demurrer to said bill at or before February rules, 1880. (Rec. 44.) In compliance with this order defendant's amended answer under oath was filed February 2, 1880. (Rec. 59.) It repeats with greater fullness as to facts, circumstances, dates, sources of information, etc., most of material denials and averments of former plea and answer. 1. It not only denies as untrue allegation that Mercer and associates and those claiming under them had fully performed every and all the terms, stipulations and conditions on their part to be performed, but sets out material requirements of contract, and specifically and circumstantially denies compliance therewith. 2. It denies that Mercer settled 100 families prior to May 1, 1845, or 250 families two years from date of contract, or

150 families within remaining three years of contract. 3. It avers that Exhibit B (Rec. 101) to original bill, purporting to give list of 119 families settled in colony by Mercer prior to May 1, 1845, is false and fraudulent; that some of the persons therein mentioned never resided in colony; that others had settled therein before contract was made, and lived upon titled land, and never claimed or received land as emigrants of colony; that nearly if not all the persons living in said colony went there voluntarily and of their own accord and at their own expense, built their own houses and established their homes, and furnished their own arms and ammunition for defense, without any solicitation, inducement, aid or assistance whatever from said Mercer or his associates, or any one for them or in their behalf, and wholly independent of, and without reference to, and in some instances without even any knowledge of the existence of, such a contract. 4. That in truth and in fact Mercer and associates, if they ever made any serious efforts in that direction, accomplished little or nothing in the way of introducing and settling emigrants under contract, and it has always been generally so understood throughout the country. 5. Denies that Mercer and associates ever had lands within colony surveyed into sections or half sections, as required by contract. 6. That they ever actually surveyed and marked lines of colony as required by resolution of February 3, 1845. 7. That they ever complied with requirements of contract touching return and filing of plats and field notes of surveys. And in connection with this denial defendant says "that after examination he has been able to find no evidence in the General Land Office of said State, where the same should properly be found, showing that any of such surveys were ever made." (Rec. 62.) 8. Sets out circumstances under which Mercer entered into contract. 9. Refers to provisions of ordinance of August 27, 1845, under which and in pursuance of law he avers suit was brought in District Court of Navarro county October 11, 1846, to forfeit annul, and to have decreed void the Mercer contract; and that it was so decreed September 25, 1848, after full hearing and upon verdict of a jury; that this decree remains in full force and effect, and has never been reversed or made void; that a certified copy of this decree, made December 11, 1848, was shortly after its rendition deposited in General Land Office of Texas for its observance. Touching its subsequent recognition, he says that said judgment and decree has been recognized by each and all of defendant's predecessors in office as valid, legal, binding and final, and has been so recognized by defendant, and he believes by all other de-

partments and officers of the government, and he still so regards it; and he has never at any time heard the validity, legality and conclusiveness of judgment or decree doubted or called into question until institution of this suit, and that the time by law allowed for the filing of a bill of review, taking appeal, prosecuting error, or otherwise reversing or bringing in question said judgment or decree, expired more than a quarter of a century ago; that the said judgment and decree was mentioned and expressly recognized in an act of the Legislature of Texas entitled "An act for the relief of the settlers in the territory commonly known as Mercer's colony," approved January 24, 1852; and in said act it was expressly declared that nothing therein contained should be so construed as to recognize any right of the contractors of said colony to any lands therein on account of said contract or rights growing out of the same.

10. In response to charge that State had recognized, by Legislature, existence of trust or liability in favor of Mercer and associates under their contract, denies that any law has been passed conceding that Mercer and associates had acquired any rights under their contract, or any claim, legal, equitable, or otherwise, against the State on account thereof.

11. Refers to act of February 2, 1850 (App., 101), under which Crockett, in 1852 and 1853, as commissioner, issued certificates to 1256 families, which complainant claims were introduced and actually settled as colonists by Mercer and associates according to contract, and insists that it was the purpose of this act, as well as of all supplementary and amendatory acts, to relieve *citizens* who were living within territory commonly known as Mercer colony; that it was a pure donation on part of State, given wholly independent of performance or non-performance by Mercer and associates of conditions of contract.

12. *Denies that Mercer or associates ever took or held possession of any lands within colony, or ever acquired title to any particular part of the lands; that they ever adduced any evidence of having settled families on any particular tract, or ever called upon Republic or State to make a conveyance; that they ever made any surveys of alternate sections for Republic, as required by contract, or ever made selections therefrom of any premium sections.*

13. Referring to provisions of contract, to effect that at expiration of five years from its date all lands within colony which had not been located by emigrant families introduced and settled

thereon by Mercer and associates, or appropriated thereunder, should revert to Republic, insists that as none of these lands were so located or appropriated prior to January 29, 1849, they then reverted to the State, which succeeded to rights of Republic.

14. Denies that contact was a *liability* of Republic, for discharge of which an *express trust* was created on public domain of Republic or State; says that Mercer's rights were simply in *expectancy;* that to enjoy anticipated benefits, he was required to perform certain things, which he never did; that before annexation, Mercer and associates, by failure to perform, had forfeited all rights under contract, but that, if it were a trust, it belonged to the political, and not judicial, department to recognize and provide for its satisfaction; that the State held legal title to her public domain; that no decree could be made against State; that her presence as a party would be necessary to authorize granting of the relief prayed; that defendant has no personal interest in matter; that duty of executing such a trust has never been devolved upon him officially, or, if in any respect he is charged with any duty in relation thereto, it is in matters of discretion, which can not be controlled by court; that he is not a mere ministerial officer, but is vested with full power, authority, discretion and judgment, in performance of his duties under Constitution and laws as member of executive department of State; that there is no law authorizing him to issue certificates to complainant; on the contrary, the act of April 19, 1879, makes it unlawful for him to do so without the consent of the Governor of the State. Denies that passage of last named act was result of a conspiracy between himself and Governor Roberts, as alleged in amended bill, or that he has in any respect violated injunction *pendente lite* of April 21, 1879.

15. Sets up laches on part of Mercer and associates; says that that if they or any one claiming by, through or under them, or any of them, or Preston, ever had any right or claim of any character whatsoever under the said contract, or were ever beneficiaries under said contract as a trust, all such rights, claims and interests were not only long before institution of suit barred by laws of limitation of State, but are stale and barred by lapse of time, and neither Mercer, his associates, or any one claiming by, through or under them, or either of them, are entitled to relief because of laches. 16. That neither Mercer, his associates, or any one claiming by, through or under them, or either or any of them, were ever in possession of any of said lands. 17. That since August 27, 1845, State

of Texas and her officers have openly, notoriously, and adversely to all the world, claimed, controlled, and from time to time disposed of, vacant lands within limits designated in said contract; that neither Mercer, his associates, or any one claiming by, through or under them or either of them, ever applied to, or demanded from, Commissioner of Land Office for a period of thirty years from date last aforesaid, any certificates to any lands within limits designated in contract, or ever asserted or pretended, until the institution of this suit, that they were entitled to any such certificates; that the said Land Office was open during the whole of said time for transaction of business, and persons were constantly receiving certificates therefrom, locating same on land within said limits, and obtaining patents thereto, without any objection or protest from the said Mercer or his associates, or any one claiming by, through or under them or either of them, and a knowledge of these facts was easily accessible to, if not in fact brought home to, Mercer and associates and those claiming by, through or under them. 18. That if any trust ever existed in behalf of said Mercer and associates, same became extinct upon failure to comply with and perform the several stipulations and conditions of contract, as herein; and said pretended trust was expressly, openly, notoriously and continuously denied, renounced and repudiated by State of Texas, its departments, officers and citizens, for a period of thirty years prior to the institution of this suit. 19. That no means have ever been used by State or any of her officers, to conceal from Mercer or associates, or any one claiming by, through or under them, any of the facts, matters or records pertaining to said contract, or acts of said State or any of her officers in relation thereto, and the same benefit is claimed of said several matters of defense by way of limitations and stale demand as if set up by a plea in bar.

20. That there are persons who, prior to granting of injunction, have made, under and in conformity to laws of State, *bona fide* locations and surveys, erected improvements, established homes and opened farms, of which they are now in possession, using and cultivating the same, on lands embraced within limits designated in contract, and who, but for said injunction (injunction pendente lite), would be entitled to and would receive patent to their said lands; that interests of such persons are materially involved in suit, and are seriously and prejudicially affected by injunction, and insists, that all such persons, a list of whose names he will promptly furnish to complainant if he so desires, so interested in this litigation, are

necessary parties to this suit, and suggests on account of their absence bill is defective for want of parties.

21. Denies that Preston, by whom suit is prosecuted, has any right or interest in subject matter of litigation, or that any authority, right or interest, legal or equitable, has ever been devised or granted to or conferred upon him in accordance with the provisions of contract, to maintain suit or obtain any relief herein. 22. Says that it appears by Exhibit Q, filed April 12, 1879 (Rec. 88), that there are 36 shares of stock in Texas Association owned by others than those claiming through Mercer, two of whom are residents of State of Texas, and all of whom are necessary and proper parties to suit; and suggests on account of absence of said persons from record, suit is defective for want of parties.

23. Says that he has no personal interest in suit, and no personal knowledge peculiar to himself of matters inquired of in interrogatories in bill, most of which are ancient, having transpired a great many years ago, and long before defendant became Commissioner. That the documents, records and papers referred to are public records of Land Office and speak for themselves—that under law of State it is his duty to furnish complainant, if he apply for same, copies thereof, upon payment of usual fees, of which fees he is by law required to make quarterly returns, verified by his oath, and which fees he is required by law to pay into State Treasury; that complainant well knows the law, and has heretofore obtained copies of records, documents, etc., from office, and could easily at any time before filing of amended bill have obtained copies of all desired papers; that defendant will cheerfully, and as promptly as clerical force at his command will enable, furnish complainant, as required by said law, such copies as he may wish, and afford him every proper facility for freest and fullest examination of all matters pertaining to contract, and action of the State and her officers in relation thereto, as far as disclosed by records in office; that defendant could not collate for complainant the voluminous maps and documentary evidence which he thus attempts to obtain within the time allowed by the order in which to answer amended bill.

Same—Replication.—This was filed February 23, 1880 (Rec. 78), and both parties under agreement (Rec. 128) took testimony.

Trial—Final Decree.—Hearing began January 16, 1882. During trial defendant made and had noted of record certain objections to evidence offered by complainant. (Rec. 331.) These will

be considered in connection with the evidence to which they relate and under the errors to which they belong. Were the points and facts few and simple it would be appropriate to give the substance of the evidence. But in this case to attempt to do so would extend this statement to too great length, and besides would not relieve counsel from the necessity of hereafter again going over the more material portions of the testimony. In view then of the fact that in discussing the effect of the proofs a careful and somewhat full statement of the evidence will be required to enable the court to apply the same to the precise questions raised under the errors assigned, we conclude statement with the final decree, which was rendered January 25, 1882.

In this decree it is adjudged:

1. "That the complainant's allegations are found to be true and supported by the proof."

2. That the injunction pendente lite, be perpetuated. Omitting from its operation the University lands, it perpetually enjoins Walsh, as Commissioner of Land Office of Texas, and all and every of his successors in office, subordinates, etc., (1) "from issuing or delivering, or permitting to be issued or delivered, to any person or persons, or to any corporation, any certificate or certificates, patent or patents, plat or plats, for any land or lands within the boundaries of Mercer's colony, as set forth in the bill of complaint and the exhibits therewith filed;" (2) from "all interference with or infringement of or upon the land grant or land reservation known as Mercer's colony;" (3) from "doing or causing to be done any act or thing whereby there may issue any patent, certificate, plat or grant of any land within the boundaries of said Mercer's colony" as set forth in bill and contract, "except to the complainant, William Preston, as chief agent of the Texas Association, or his successors or assigns, or to such person or persons as he or his successors may in writing direct;" (4) from hindering, obstructing, preventing, or delaying the said William Preston, his agents, attorneys, etc., "in the surveying, selecting, platting, recording, entering, or claiming any and all lands lying within the limits and boundaries of the so-called Mercer colony, as set forth in the bill of complaint and the exhibits therewlth filed;" and (5) from "hindering, obstructing, preventing or delaying the said Preston, or his successors or assigns, or the Texas Land Association, from performing and completing and perfecting all and singular the several conditions, duties, obligations, and acts devolving upon the said Preston, or the said association, under the terms and stipulations of the colonization contract set forth in the bill of complaint in this cause, and in the exhibits filed with the said bill of complaint."

Defendant perfected appeal to this court February 3, 1882. (Rec. 336.)

ERRORS ASSIGNED.

I. The court erred in decreeing under law and proofs that Mercer and associates had so performed the conditions of their contract with the Republic of Texas as to acquire thereunder rights susceptible of judicial cognizance and enforcement.

II. The court erred in holding that articles of annexation between United States and Republic of Texas created a trust in favor of Mercer and associates cognizable by said court.

III. The court erred in not sustaining defendant's plea of res adjudicata.

IV. The court erred in not sustaining defenses of stale demand, laches and acquiescence.

V. The court erred in holding that complainant had shown such interest in subject matter of suit and such title in himself as to authorize decree in his favor.

VI. The court erred in not dismissing bill, because in effect a suit against State of Texas.

VII. The court erred in not sustaining defendant's objections for want of parties.

VIII. The final decree, as rendered, is not only contrary to law, but fails to define rights of complainant or duties of defendant, and must prove nugatory so far as real merits of controversy are concerned. Said decree is further erroneous in adjudging costs of suit against defendant Walsh.

I.

The court erred in rendering decree for complainant, because, under law and proofs, Mercer and associates had not so performed their contract as to acquire thereunder rights susceptible of judicial cognizance and enforcement.

Instead of adopting usual plan, of first considering defenses in bar to relief, though all be fatal, and the court upon sustaining, either may content itself with reversing and dismissing without examining entire record, we prefer to meet appellee in outset upon that which lies at foundation of his claim, if, indeed, it ever had anything upon which to stand, not only because of faith in result, but because the development of case in beginning required by this line of argument will lessen labor of court and counsel, when we come to discuss those matters which relate, not so much to alleged merit of claim originally as to right now to invoke in its behalf the interposition of the judicial tribunals of the country.

It may be conceded that testimony tends to show that Mercer and associates did at first spend some money in advertising, and in attempting to survey boundaries of, and sectionize small portion of lands within colony; that they made certain reports to the Secretary of State, and tried, especially since institution of this suit, to keep what they call the "Texas Association" alive by holding occasional meetings and writing each other letters; that they employed and paid fees to lawyers to represent them before legislative committees and to bring suits (which were never brought); that they appealed in vain to Legislature for settlement, or for privilege of suing State, and have entertained some hope that their claim would in the end be provided for. All this, and much more of like character, may be admitted, and still the important question remains, viz: "DID MERCER AND ASSOCIATES EVER PERFORM THEIR CONTRACT WITH THE REPUBLIC OF TEXAS SO AS TO ACQUIRE ANY RIGHTS THEREUNDER WHICH A COURT OF EQUITY CAN ENFORCE?"

If they did not, they have no claim which can be the subject of judicial cognizance or enforcement. If they did, it devolved on

them to *prove performance*, and to bring themselves within rules and principles governing courts of equity in administering relief in like cases. In considering the evidence we should leave out of view all extraneous matters as to what Mercer, Hancock Preston and others may have said, written or done long after contract expired, *and confine inquiry to period between January 29, 1844. and January 29, 1849. Whatever Mercer and associates did to acquire rights under contract must have been done during the five years between these dates.* It was expressly provided in contract itself that all lands not located by emigrant families introduced and settled thereon or appropriated under the provisions of contract within five years from date thereof should revert to Republic. And the presumption is that they did so revert. (Castro vs. Jones, 7 Tex., 219. Stewart vs. Crosby, 15 Tex., 546.)

It is claimed that Mercer and associates during said term (i. e., from January 29, 1844, to January 29, 1849,) *did introduce and actually settle 1256 families, and did in every particular well and truly perform all the covenants which under the contract they were bound to perform according to its tenor and true meaning*, and that by reason of the introduction and settlement of said 1256 families they were entitled to 1256 sections of 640 acres each, being one section for each family, and in addition thereto 120 sections, being 10 premium sections for each 100 families, making in all 1376 sections.

No sufficient evidence of introduction and settlement of emigrant families by Mercer and associates.—Under the law Mercer and associates were to introduce emigrant families from *abroad*, "and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them for the number of families which they are bound to introduce." (Sec. 13 of Act of February 4, 1841, p. 3, ante.)

Each family is defined in contract to consist either (1) of a man and wife; or (2) of a widower and two or more children—if males, under the age of seventeen years, if females, unmarried; or (3) of a widow and two or more children, unless one be a son above seventeen years of age, in which case one child should suffice; or (4) of two single men over the age of seventeen years. (Rec. 92, and p. 7 ante.)

Under joint resolution of January 16, 1843, referred to in contract, they were "required to settle each year, within the territory

prescribed, or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed; and in default of introducing and settling such number of families, their contract shall be forfeited." (Page 4 ante.) This required 250 families by July 1, 1845, and same number by same day for years 1846, 1847, 1848 and 1849—making 1250 in all.

The contract undertakes to vary this requirement—and in this spect it is void as against law—by making it necessary to settle only 100 families by May 1, 1845, and 250 by January 29, 1846, and 150 for each year of remaining three years—making but 700 in all. (Page 7 ante.)

If Mercer and associates did, as claimed, introduce and settle 1256 families in five years, it should appear: 1. That they were brought from *abroad* and not substituted from within Republic. 2. That the 1256 were each a family as defined in contract. 3. That 250 of such families (including those on the ground July 1, 1844,) were settled by July 1, 1845, 250 between July 1, 1845, and July 1, 1846, and same number between same days of years 1847, 1848 and 1849.

Complainant offered in evidence copy of what purports to be "Original agreement between Mercer and 119 settlers, sworn to by Rowlett, Pillans and Bean, August 2, 1845. (Rec. 101, 105.)

When or by whom this paper was filed in Land Office, from which copy in evidence was taken, does not appear. It was certified therein that each family had and occupied a suitable house or cabin. Pillans, who was Mercer's employee, and whose depositions were taken by complainant, appears as a witness to 92 of these 119 names. According to this paper twenty-two of these families were settled between January 29, 1844, and July 1, 1844, and thirty-five between July 1, 1844, and January 1, 1845, and sixty-two between January 1, 1845, and May 1, 1845.

Upon this point there are some singular contradictions. In prospectus issued by Mercer, September 20, 1844, he says there are already 100 families on the lands. (Rec. 208.) In report made by Mercer to Secretary of State, January 17, 1845, he says there were 109 emigrant families on the grant July 1, 1844, when according to paper signed by Rowlett et al. there were *only twenty-two*. In another report made by Mercer to the Secretary of State, September 25, 1845, he says he settled the *preceding year* 220 families

(Rec. 83), when according to paper signed by Rowlett et al. there were *only fifty-seven.*

The paper signed by Rowlett et al. purports to contain a *true and accurate account* of emigrant families, as certified to by the heads thereof, settled in the colony by Mercer and associates prior to May 1, 1845, and we naturally conclude that *as the profits which Mercer and associates were to realize on their venture depended on the number of families introduced, it is as full as could be made.*

But is this agreement between Mercer and associates and certain settlers, to which the Republic was not a party, evidence of the actual introduction and settlement of the persons therein mentioned as emigrants?

It does not purport to be a compliance with the contract as to proof to be laid before Commissioner of Land Office. Contract requires "a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said party of the second part (Mercer and his associates), or their legal representatives, have caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land, which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family or several families respectively therein," etc. (Rec. 96.)

Each settler says he "has and occupies a suitable cabin or house, as described in said contract" (Rec. 102), but Rowlett, Pillans and Bean in their affidavits are *silent* upon the very matters upon which the oaths of disinterested persons are required. (Rec. 105.) If Republic or State had accepted this as proof, it would seem that Mercer and associates would have applied for deeds; but there is no evidence of any such application, and the bill admits no deeds were ever made. Complainant examined none of these 119 persons as witnesses, to prove that they had been introduced and settled by Mercer. Another significant thing about this paper is that only a few of the 119 appeared before Crockett, who was appointed Commissioner, under act of February 2, 1850, to get certificates, notwithstanding the fact that from Crockett they could get certificate for *whole of the land without cost*, whereas, under contract, they were compelled to divide with Mercer. And yet, of these 119 settlers who say they were actually living in houses on the land in 1845, only a few thought their homes and land of enough value

to accept them as a gift, notwithstanding they were situated in one of the richest and most desirable sections of the State.

Pillans (who signed the paper containing the 119 families, and was a witness to 92 of the 119 signatures), witness for complainant, was in Mercer's employment from the making of the contract to May 1, 1845, and according to his own statement never went into colony after the day last mentioned, says he met only one family claiming to have settled prior to Mercer grant, and that but few emigrants came prior to the actual survey of the north and east lines of the colony, which was begun in March or April, 1844. He also says, he rarely, if ever, knew where colonists came from, or what induced them to come to colony. His statements are evidently based, in the main, on the paper signed by him, for he says: "There were issued to actual settlers, who complied with the requirements of the contract, during the first year, more than one hundred families; one hundred and eighteen, *as I find upon examinations of returns made and sworn to at the time by Rowlett, Bean and myself.*" (Rec. 161.) The character of the affidavit has already been adverted to. Of the 119 persons he can remember as settlers only Thacker Vivian, his wife and daughter, and his two sons, and one Damron, on or near head of Sabine River.

Garnett, witness for complainant, visited Texas in March, 1847. Says, in answer to 6th direct interrogatory (Rec. 184), he saw many colonists, and that Rowlett and Anderson showed him lists of families at that time largely in excess of those required by the contract, and that he gave these lists to Mercer, April, 1847, and has never seen them since. Defendant objected to this answer of Garnett's, in so far as it speaks about lists of colonists handed him by Mercer's agents, and what said lists showed as to the number of colonists, because said lists being in writing would be the best evidence, and their absence has not been accounted for; but, on the contrary, said lists were delivered as said witness states to Charles F. Mercer." (Rec. 332.) Chambers, witness for complainant, who came to Texas about 1837, was deputy surveyor for eleven years after 1839, and district surveyor of Robertson Land District two years, and resided in what is now Robertson county between 1845 and 1848, and went with Mercer into colony between these dates; says there were several new settlers in the colony at time of this visit, but has no idea what number. He mentions names of four families on lands surveyed prior to colony grant. He also

states that he was employed by Mercer to make surveys and sectionize lands, but did not do so, as the settlers were opposed to it, claiming that Mercer had not assisted them in any way, that they had come at their own cost, and objected to having their land surveyed and to giving up a part of it to Mercer. He also says he never heard, at any time, of any one acting as agent for Mercer, or of any houses being built by Mercer and associates for settlers. (Rec. 264, et seq.)

Riggs, who came to Texas in 1845, says there were some few settlers in supposed limits of colony when he came to Texas, but don't know who introduced them. Several persons settled in colony in 1846 on west side of Trinity; some settlements also east of Trinity; but don't know that any person introduced settlers, and as far as he knows settlers built their own houses. He also says that one Anderson, claiming to be an agent of Mercer's, surveyed a few tracts of land in Navarro county; thinks the emigrants paid him for it; they came in 1846–1847. He further says that he never received any land as a colonist of Mercer, and, referring to the report of 119 settlers made by Rowlett and others, he mentions the name of but one person as known to him, though many of the names are familiar to him, and he thinks most of them lived in Anderson, Van Zandt, and Kaufman counties. He states further that he was acquainted with nearly every man from Navarro county line to Dallas county line, but don't know how many were settlers of Mercer's colony, and with every man west of Trinity within supposed limits of colony. (Rec. 316, et seq.)

Terrell, an old surveyor, who first visited colony in 1840, and who has resided within limits of colony since 1846, says that previous to January, 1844, there were very few settlers in colony east of Trinity, one small settlement in Dallas county, and six or seven families in Kaufman; that during 1844, 1845 and 1846, a good many families settled in colony east of Trinity; knew very little of settlements west of Trinity at that time; don't know who induced emigrants to settle in colony; settlers brought arms and ammunition with them, and assisted each other in building houses; and that he never knew or heard of Mercer or any of his associates assisting settlers in any way. He also says that he was surveying in colony during the time; was among early settlers a good deal, and made pre-emption surveys for some of them, and that he never knew of Mercer and associates introducing any colonists. (Rec. 274, et seq.)

Harlan, who came to Texas in fall of 1846, and has resided ever since within the limits of colony, says that neither Mercer or any one else had anything to do with his settlement within colony; that a good many persons came with him and settled in Navarro county, and he mentions the heads of four families who came with him, and says they came and settled of their own accord, and furnished themselves with arms and ammunition, and built their own houses. He also says he got a 640-acre certificate, issued by Crockett, which he sold; that one Kendall also got a certificate and sold it, and one McKinney got a certificate and located it in Johnson county. He states that he remembers twenty unmarried men over 17 who settled in colony, and some heads of families; was acquainted with them in 1846 and 1847; lived among them, and visited back and forth. Mentions the names of five persons among the 119 in the paper signed by Rowlett, et al. He also states that Mercer and associates, or their agents, never had anything to do with him or any of those who came and settled with him; says he knew nothing of people in colony in 1845, and but little in 1846, and never knew or heard of Rowlett, and knew of no effort on the part of Mercer to settle emigrants in colony. (Rec. 287, et seq.)

Young, who came to Texas in 1843, and has resided in various places in Mercer's colony since 1843, was 51 years old when deposition was taken in June 1880, making him only fourteen years old when he came to Texas, says he came with his father and family to Texas, and that neither Mercer or his agents furnished his father with anything, or gave him any assistance whatever. (Rec. 278, et seq.)

Martin, who came to Texas in 1846, and settled in Dallas county, says he was not induced to emigrate by any one. On arriving at Jefferson, Texas, was told there was such a colony as Mercer's; was induced to settle in it by one Hedgecock, who said he was agent for *Peter's* and Mercer's colonies, and offered him 160 acres of land, but was never aided or assisted by Mercer, or any of his agents or associates; says he never received any land from Mercer, but got a 320 certificate from the State of Texas, in 1858, upon complying with the law as an actual settler; Mercer and his associates had nothing to do with this land. (Rec. 280, et seq., 109.)

Crockett, the commissioner who issued certificates under the act of February 2, 1850, to 1256 persons, and a copy of whose report was used, as we shall next see, by complainants as evidencing the

introduction and settlement by Mercer and associates of this number of families, says he came to Texas in 1847; that he was appointed commissioner under the act mentioned in 1850, and that his official duty made it necessary for him to travel all over the colony, and become acquainted with colonists; visited every settlement within colony, and posted hand-bills, notifying all claimants to come forward and make proof under the law; the general opinion of settlers was that there was no validity in claims of Mercer's colonists as such, and the settlers did not base their claims on Mercer's contracts; after examining names in paper signed by Rowlett, et al., identifies several of them as persons with whom he was acquainted, and to whom he issued certificates, and says that so far as he can recollect there was no exception to the opinion entertained by the settlers that Mercer had failed to comply with his contract; that he had not surveyed the lands or performed any other act or stipulation required by his contract; that it was a common report in 1849–50 that Mercer and associates had done nothing in settlement of colony, in surveying lands, and furnishing houses and ammunition, and it was understood that settlers had located without aid from Mercer and associates, and had no connection or relation with Mercer; that the settlers had had their own land surveyed, and that he never heard a settler claim that he was introduced by Mercer or associates, or claim land under Mercer's contract. (Rec. 296, et seq.)

Crockett's Report Not Evidence of Performance of Contract by Mercer and Associates.—It is claimed, as we have seen, that Mercer and associates, during the term of five years did introduce and actually settle 1256 emigrant families. In support of this claim the report of Crockett, commissioner, under act of February 2, 1850, was mainly relied upon. (Rec. 116, et seq.)

The views of his Honor, Judge Pardee, as to the effect of this report, is shown by the following extract from his opinion:

> There is no direct evidence to show whether the 1256 families, proved by Crockett to have settled prior to October 25, 1848, were all or any of them introduced by Mercer or the Texas Association. Nor is there any proof to show the negative.
>
> The families were there and settlers. They could only be there lawfully under Mercer and the Texas Association.
>
> In the absence of proof, it is a strong presumption that they were settlers there lawfully—that is, under Mercer and the Texas Association—not as trespassers and squatters.

Besides this presumption, I do not regard it as absolutely necessary that every settler who located in the Mercer colony should have been previously personally solicited and induced thereto by Mercer or his agents. The contractors could not have so contemplated.

One settler would naturally induce others, and the advertisements and maps and advantages and improvements would certainly aid in the scheme of colonization and settlement.

The depositions offered by the defendant upon this subject (which are amenable to the charge of incompetency, as heresay evidence, but), though given full force as evidence, are not strong enough to rebut this presumption in favor of law and order.

The witness knew, had heard, of no one who claimed to have been induced to settle by Mercer or his agents, or under the Mercer colony grant.

And it might be noticed, under the law of 1850, it was not necessary, in order to receive the donation offered by the State, that they should claim under Mercer.

And it is plausible to say that, under the hostile attitude evinced by the people of the State at that time towards the colonization contracts, many settlers might have been deterred from claiming under obnoxious titles, particularly when such claim was wholly unnecessary. (App. 127, 128.)

This report, which was admitted over the objection of the defendant (Rec. 334), contains names of 1256 persons to whom Crockett issued certificates, and it is from this that the precise number is arrived at. The persons named therein should, if claim be true, be the identical colonists actually settled by Mercer and associates, for upon no other ground could lands be claimed for them as their colonists. The fact that complainant did not attempt to prove by a single one of these 1256 alleged colonists—the very persons above all others to know by whom, when, and under what circumstances they settled in the colony—leaves us to infer that he relied upon the report itself as conclusively establishing his claim in this behalf. The law under which Crockett acted, and which will be found in full in appendix 101, and in Hartley, p. 702, was not passed until several years after the contract expired, and was not intended as an admission on part of State that Mercer and associates had settled the persons for whose benefit it was passed, or had in any respect complied withthe requirements of their contract. (See p. —, ante.) It is entiqled "An act for the relief of the citizens of Mercer's colony." In section 1 it is provided, "That nothing herein contained shall beconstrued so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this

law had not been passed." A bare glance at provisions of the law under which Crockett issued certificates and provisions of the contract as to proof necessary to obtain titles, etc., is enough to satisfy the mind that the law was not framed in furtherance of or to carry out the contract, but was intended for the benefit of the settlers, or rather as a donation to citizens living within the colony, who had theretofore been delayed in getting titles.

Differences Between Contract and Act of February 2, 1850.—We note some of the material differences.

Under the contract, Mercer and associates were to bring their emigrants from abroad, and settle them in colony, the substitution of families living within limits of Republic was not to entitle them to any premium for such families, nor to operate in their favor for the number of families they were bound to introduce. (See act of February 4, 1841; App. 1.) This was well understood by Mercer and associates, for we find them, in their articles of association, empowering their chief agent to contract for the passage of emigrant families from the United States and Europe, etc. (Rec. 146.) And in a prospectus headed "Texas Colonization," dated September 20, 1844, Mercer, as chief agent, offers to emigrants from Europe and the United States as much as 320 acres to every family who will settle in the colony prior to March 20, 1845. (Rec. 208.)

The act of February 2, 1850, under which Crockett issued certificates, gave its benefits to those that "emigrated to Texas and became citizens of said colony prior to the twenty-fifth day of October, 1848, and were then citizens thereof."

Under the contract, the colonist could only get his title to the land upon which he had been actually settled, through Mercer or by Mercer's directions.

Under the act of February 2, 1850, the State authorized the issuance of certificates directly to the party, his title emanating from the State through the act of a commissioner, and wholly independent of any consent on the part of the contractors.

Under the contract the colonist was to get a *particular piece of land*, previously surveyed so as to include his improvements.

Under the act of February 2, 1850, the colonists, instead of obtaining deeds or patents to specified tracts, received certificates which could be sold, or located on any vacant lands within the colony as headright certificates.

The certificates issued to witnesses, Young and Harlan, were sold by them. (Rec. 279–2867.) Under the contract, the colonist was to get not less than 160 acres of land, or such further quantity as might be agreed upon between himself and the contractor.

Under the act of February 2, 1850, each family got 640, and each single man over the age of 17 years 320 acres of land.

Under the contract no single man was entitled to anything, unless over 17 years of age when introduced and settled in the colony.

Under the act of February 2, 1850, it was sufficient if he was seventeen years of age on October 25, 1848, without regard to his age when he settled in the colony; for instance, H. W. Young, who was a witness in the case, and who was fifty-one years old in June, 1880, when he signed his deposition, came to Texas in 1843, being at the time only fourteen years old, got a certificate from Crockett and sold it. (Rec. 278–279.)

Under the contract, before a colonist could get any land, Mercer and associates were required to exhibit to the Commissioner of the General Land Office, or other proper officer, in manner and form as prescribed in the contract, evidence of having *surveyed* the portion of land for which conveyance was desired, and that there were comfortable small houses or cabins erected thereon, and families residing therein, who had been settled thereon by them. Mercer and associates were also to have correct plats and copies of field notes made and filed in Land Office, so that as they became entitled to any section it could be marked on plat, and the character of evidence they were to furnish to the commissioner was a certificate under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that Mercer and associates had built or caused to be built a comfortable house or cabin on the parcel of land which they were bound by the contract to convey to each family, and had actually settled a family thereon. All this was necessary, under the contract, before a colonist could get a single foot of land.

Under act of February 2, 1850, applicant for a certificate (not land) was required to prove by his own oath, supported by the oaths of two respectable witnesses, that he emigrated to Texas and became a citizen of the colony prior to October 25, 1848, and was then a citizen thereof, and was further required to swear that he had performed his duty as a citizen, and had never received any land from the government by virtue of his emigration to Texas.

Even if the Legislature had not, as we have seen, taken pains to declare in express terms that nothing in the act of 1850 should be construed so as to place the contractors in a better condition in regard to the State of Texas than if the act had not been passed, thus negativing the idea that they intended to admit that Mercer and associates had so performed their contract as to acquire rights thereunder, a comparison of the law with the contract would lead to the same result.

The case of Cansici vs. LaCoste (20 Texas, 269), presents view held by Texas courts as to difference between rights of colonists *under contract* and under relief laws like act of February 2, 1850.

One Castro had made similar contract with Republic and under same law (act of January 4, 1841) as did Mercer. Cansici was plaintiff in court below. He claimed as assignee of Castro, the contractor. The defendant, LaCoste, claimed under certificate issued by a commissioner, under act of January 22, 1850, similar in purpose (to relieve the settlers) to act of February 2, 1850, under which Crockett issued certificates. Judgment was rendered for LaCoste, who held under the commissioner's certificate. The court say:

The material question is, whether the legal rights of the colonists depend upon that law, or the colonization contract and laws in force during its subsistence. The contracts between the contractor and the colonists were made in anticipation of rights to land thereafter to be acquired by means of a compliance with the colonization contract and the laws under which it was made. At the time of the making of these contracts, the subject matter of them, titles to land, had no legal existence. It was by virtue of acts thereafter to be performed by the parties, that they were to be acquired, and become invested with the properties of legal rights. At that time everything was in expectancy. The only right the parties then had was the right to perform their contract with the government, and reap the benefits it was intended to confer. But whether in fact they should ever enjoy the anticipated benefits, depended upon the contingency of their performance of their contract to colonize, and become colonists and inhabitants within the limits assigned, agreeably to the terms of the contract and law of colonization. It abundantly appears, from the evidence, that the contract was never performed. The time appointed for its performance expired, and with it the parties lost the only legal right they ever had under it, that of carrying it into complete execution, according to its provisions. After the 15th of February, 1847, that right no longer remained. By reason of their non-performance, they ceased to have any longer any legal right; that is, such a right as the law will recognize, under or by virtue of the contract with the government. *They had, it is true, the same imperfect right which all have to appeal to the justice, generosity and magnanimity of the government, which the latter may exercise through its legislative department; but they had no perfect right; none which a court of justice can recognize; which is what*

s understood by the term legal right. The principal contract, and all the anticipated fruits of it, in the way of legal rights, had become extinct, and so remained. The principal contract having thus fallen, all the other subordinate contracts of the parties, which were dependent upon, fell with it. And thus the matter stood, at the passage of the act of the 22d of January, 1850. The meritorious considerations which induced the Legislature to pass that act, were not legal equities, so to speak; that is, they were not equities of which any court of law or equity could take cognizance. In a legal point of view, therefore, the act of 1850 must be regarded as conferring a pure donation. It was based, doubtless, on what were justly deemed highly meritorious considerations, of justice and policy. But the benefits conferred were not the less, in a legal point of view, a free gift; for the recipients of the legislative bounty had no legal claim upon the government. It matters not that they were ever so meritorious; every similar act of governmental favor is supposed to have for its motive a meritorious cause; but unless it be in discharge of some obligation of the government, which the law recognizes, it cannot be deemed, in a legal sense, anything but an act of sovereign grace and bounty on the part of the political authority. The act of 1850 did not, nor could it, resuscitate these fallen contracts. They remain, as they were upon the failure of the parties to perform them, on the 15th of February, 1847, incapable of being enforced. (Ordinance of 1845.) The act of 1850 does not undertake to afford, nor can it afford, aid to the contractor to enforce the specific performance of contracts with his colonists, which the former had lost all right to claim the performance of by his failure to perform on his part. Doubtless, if he expended money for their benefit, at their instance, or if he rendered them valuable services, they were liable to make restitution or compensation. But they are not bound specifically to perform a contract to convey land, their ability to do which was made to depend on his performance of *precedent acts*, which he has failed to perform. We conclude there was no error in the charge of the court in the matters complained of.

In respect to the land contracted to be conveyed after the right was acquired under the act of 1850, it is not perceived that there was any erroneous ruling adversely to the appellant. We are of opinion that there is no error in the judgment, and it is affirmed.

No evidence that Mercer and associates introduced and settled the 1256 persons mentioned in Crockett's report.—His honor, Judge Pardee, as shown by extract from his opinion, already given, says there was no direct evidence as to whether all or of any the 1256 persons were introduced by Mercer or the Texas Associattion, and no proof to show the negative, and that in absence of proof it is a strong presumption they were there lawfully, under Mercer and associates, not as trespassers or squatters, and he gives weight to "this presumption in favor of law and order."

It is admitted in original bill that not long after execution of con-

tract many adventurers, etc., wrongfully entered upon and held and occupied lands within colony. (Rec. 7, and p. 14, ante.) It is also admitted in amended bill that in violation of rights of Mercer and associates, defendant and his predecessors in office have issued to "*numerous persons, strangers to your orator, and not claiming through, under, or in privity with the rights of Mercer and his associates and assigns, certificates for land and patents for land within the limits and boundaries of said Mercer's colony.*" (Rec. 47, and p. 23 ante.) Mercer, in his communication to the Republic, offered in evidence by complainant, says:

"From the surveys of the country I also learnt that the official communication by the surveyor-general of the lines of my contract, which have natural corners in Robinson, and could not be mistaken, had been purposely kept back by the bearer or his agent, while a *rush into the lands set apart for colonization to make private locations has been manifested by the fact that, with a full knowledge from my report of the existence of contract, more than nine hundred surveys were made subsequently to its date.*" (Rec. 83.)

This communication is dated New York, September 25, 1845, and has reference to a trip previously made into the colony.

Even Pillans, who, as we have seen, signed list of 119 families, as one of complainant's witnesses, says, there were some of the settlers who refused to take certificates of title from the colony, though they were not numerous.

Crockett's report is signed December 11, 1851 (Rec. 142), about seven years after Mercer's contract was made. If we are to indulge in presumptions, we may presume if 900 adverse surveys were made in a year after contract, that in view of evidence as to lands in colony being regarded as vacant, etc., that a large portion of persons who did locate in colony, had no connection with Mercer or his contract.

As before observed, the 1256 persons named in this report should be each and all the indentical persons introduced by Mercer and associates as colonists, or they have no right to claim them as such. If we compare list of 119 families contained in paper signed by Pillans et al. (Rec. 102), settled prior to May 1, 1845, with a list of 1256 persons to whom Crockett issued certificates, names of but few of the 119 appear in Crockett's list.

And yet each of the heads of the 119 families certify that his "own family has and occupies a suitable cabin or house as described in said contract." (Rec. 102.)

If Crockett's list is to be taken as evidence of the colonists settled by Mercer, where are the almost entire number of the 119 families and settlers who were actually occupying cabins on the land in 1845?

Complainant cannot claim that he is entitled to the 119 in addition to the 1256, for some of the 119 appear among the 1256, and he cannot count them twice, besides, he nowhere claims more than 1256.

Again, why is it, as already suggested, if these 119 and 1256 were Mercer's colonists, introduced and settled by him, none of them were examined to prove the fact? The onus of proof rests on complainant. His right to relief depends, not on absence of proof or on presumptions arising from such absence, but *upon evidence which it is his duty to produce.*

But, as we shall see in further considering non-performance by Mercer and associates, of conditions of contract, if they had induced every one of the 1256 to settle within colony, this of itself does not entitle them to relief.

No sufficient evidence of survey of exterior lines of colony. Joint resolution of Republic, of February 3, 1845, provided:

"That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land *actually surveyed and marked* by the first day of April next.

"That a failure to comply with the provisions of the above section shall work a forfeiture of their contract." (Hartley, p. 660; App. 24.)

Whilst it is claimed that this resolution is in derogation of contract, bill alleges, notwithstanding short time, etc., Mercer and associates "did cause said lines of said colony lands to be actually surveyed and marked before the 1st day of April, 1845." (Rec. 20 and p. 18 ante.) Defendant denies that this was done. (Rec. 35, 61, 62.) Statement that said resolution was complied with renders it unnecessary to consider whether it is void as impairing obligation of contract. Having been adopted before the admission of Texas into the Union, Constitution of the United States does not operate thereon. (League vs. De Young, 11 How. 185; Herman vs. Phalen, 14 How. 79; Owings vs. Speed, 5 Wheat. 420.)

As evidence of survey of exterior lines of colony, copy of map was offered. Defendant objected to its admission. "1. Because said paper is not certified to by the proper officer. 2. Because said paper is not a copy of a public archive. 3. Because said paper is

immaterial, irrelevant, and is not admissible as evidence for any purpose." (Rec. 334.) This map (Rec. 112) bears date May 1, 1845. To have any force as evidence it should have come from the Land Office. This is the lithographic map, intended as an advertisement, and for distribution among copartners and others, to which Mercer refers in report of December 31, 1845. (Rec. 174.) Outside of map, which is no proof of what was done on the ground, the deposition of Pillans, an agent of Mercer, is relied on.

29 Jur 317
1 Black 209
11 Wall 395

If we give to the testimony of this witness all that could be claimed for it, it shows that 50 miles of line which he speaks of as the northern boundary line, commencing 50 miles below Red River, and running east, was run and marked. He says, "As the line from Red River south 50 miles lay within what was well known as Peters' colony, it was deemed necessary (should be unnecessary) to run this part, so I authorized him (Hunt, the surveyor,) to commence at the east line of Peters' colony and run east." (Rec. 159.)

We may also infer from his answer to 18th interrogatory (Rec. 161 162), that the east lines were run. And from Terrell's answer to 5th interrogatory (Rec. 273) that a portion of south boundary line, passing through Henderson and Wood counties, was run. There is no evidence that most of the lines, amounting to about 200 miles, as called for in contract (Rec. 98), were "*actually surveyed and marked*" as required by resolution of February 3, 1845. Spence, formerly Commissioner of the Land Office of Texas, and one of complainant's witnesses, says that the "limits or boundaries called for were so indefinite that it could not be accurately or with any certainty known what territory was actually embraced in the colony, and for years the Land Office, county surveyors, and the people generally, acted as if no such contract existed, and the lands were surveyed and patented regardless of it." (Rec. 261.)

No sufficient evidence of having built cabins for settlers.—This was material requirement of contract, and condition precedent to Mercer and associates or settlers receiving lands. When Mercer and associates had "built a corresponding number of small comfortable houses or cabins, of logs and other materials, and placed families therein, they shall receive a title from this government," etc. (Joint resolution of January 16, 1843, p. 4, ante.) This condition precedent is repeated in contract. (Record 92.) And it is expressly provided therein that conveyance was to be made only after Mercer and associates "shall exhibit to the Commissioner

of the General Land Office of the Republic, a certificate under oath, subscribed by two witnesses and certified by some one qualified by the laws of Texas to administer an oath, that the said party of the second part (Mercer and associates), or their legal representatives, have caused to be built a small comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to such family, or the several families respectively," etc. (Record 96.)

The record does not disclose that any such proof was ever made. The unsupported statement (not under oath) of the 119 settlers who signed the agreement with Mercer, and the affidavit of Pillans et al., have already been adverted to. (See p. –, ante.) Very few of these settlers ever claimed either cabins or land. Pillans says that settlers who first came "built, under contract with us, their own cabins." (Rec. 165.) This is not the proof required by the contract; besides, though interrogated specially as to names and numbers, he is silent in relation thereto.

Chambers, a witness for complainant, and one of oldest settlers in that section of country who was engaged by Mercer to make some surveys, says, "I was advised by nearly all the settlers that I saw not to do it, that Mercer had not assisted them in their settlement in any way. They seemed opposed to having their lands surveyed under any contract with Mercer." (Rec. 265.)

Terrell, another old settler, referring to settlers who came in '44, '45 and '46, says they "assisted each other in building houses and otherwise. I never knew or heard of Mercer or any of his associates assisting any of the settlers in any way. Was among the early settlers a good deal and made pre-emption surveys for some of them." (Rec. 274.)

Young, who came with his father from Illinois to Texas as early as 1843, and settled within limits of colony, says, "Mercer nor his associates or agents did not furnish my father with anything, or give him any assistance whatever." (Rec. 279.)

Young received a certificate from Crockett and sold it. (Rec. 279.) Martin, who settled in colony in 1846, in answer to interogatory 4, as to who had a house built for him, says "no one" (Rec. 126, 280, 281); and to 5th interogatory, "that he was never aided or assisted in any way by Mercer or by any of his agents or associates." (Rec. 281.)

Harlan, who came from Illinois to Texas in 1846, and settled in

colony, referring to a good many who emigrated with him, says, "we built our own houses." (Rec. 288.)

Crockett, commissioner under act of February 3, 1950, and who visited every settlement in colony, says: "It was the common report in the colony in 1849 and 188, that Mercer and his associates had done nothing in the settlement of the colony in the surveying of the lands, furnishing homes and amunition," etc. (Rec. 299.)

Riggs, who came to Texas and settled in colony in 1845, and who was acquainted with many of the settlers, says: "So far as I know, they built their own houses." (Rec. 317.)

The law under which Crockett issued certificates did not require proof that Mercer and associates had built cabins, or that the settlers had built or even occupied cabins. This law gave, not *lands*, but *certificates*, and these could be located or sold.

No Evidence to Identify Claim of Mercer and Associates with any Particular Section or Half Section of Land Within Colony.—If Mercer and associates had introduced 1256 emigrant, families; if they had surveyed lines of colony as required by resolution of Februury 3, 1845; if they had caused to be built a cabin for each family, they would still have no right to call on Republic or State for conveyance.

Under section 7, of act of February 4, 1841, lands to be given to families were to be located *in a square*. (See p. 2, ante.) Under resolution of January 16, 1843, the President of the Republic was authorized to make the title and conveyance of each section of 640 acres of land which has been or shall be required under any contract made or to be made by the President of this Republic with the grantees or their assigns, or legal representatives, to the said grantees or their assigns or legal representatives, direct: *Provided*, That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid," etc. (See p. 4, ante.)

Under contract, Mercer and associates were to "cause the unappropriated lands within the prescribed limits to be surveyed, as needed for the purpose of settlement, into sections of six hundred and forty acres, or half sections of 320 acres, at their option." (Record 92.)

It was also expressly agreed that Mercer and associates—

"Shall cause the lands within the limits designated in this contract to be surveyed from time to time, and divided into sections of 640 acres, and half sec-

tions of 320 acres, so far as the same may be practicable; and where, by reason of the intervention of large streams of water, or navigable rivers, this shall be impracticable, or it be rendered so by prior locations, fractional sections of greater or less dimensions than one-half may be made, and the quantity of land therein estimated and carried to the same account in all respects as the entire sections, by computing fractional sections in quantities of 640 acres, and subjecting them as far as practicable to the same conditions as are herein prescribed in relation to the entire sections or half sections of 640 and 320 acres.

And of all such surveys, correct plats and copies of the field notes shall be made, denoting therein the ranges and number of the section or half section, and the fractional sections exceeding or falling short of one-half section; and the same, or a correct copy thereof, shall be returned to the General Land Office of the Republic; and as the party of the second part shall become entitled to any section or number of sections, according to the terms of this contract, they shall be marked on said plat; and whenever the party of the second part, or their authorized agent or legal representative, shall exhibit to the commissioner of the General Land Office of the Republic a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said party of the second part, or their legal representatives, have caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family, or several families respectively, therein, they shall immediately receive thereafter a full and absolute conveyance from the government of the Republic for as many sections of land of 640 acres, or half sections or other fractional parts of sections equal in amount to 640 acres, as there shall be families certified to in such certificate or certificates." (Rec. 95-96.)

It was also provided in contract "that each alternate section or half section of 640 or 320 acres shall be reserved to the Republic." (Rec. 93.)

Articles between Mercer and associates refer to sections of land reserved to Republic (Rec. 145), and provide, among other things with respect to the chief agent of association, that—

"He shall contract for the survey and distribution into sections and fractional parts thereof, of such lands as may be required from time to time for the immediate settlement of the emigrants, and may purchase with the lands or money of the association for the mutual benefit of the association and the vender any liabilities of the Republic of Texas, and to invest them in the purchase and colonization of the reserved sections, or any part of them, according to such terms as he may deem advantageous to the association. (Rec. 146.)

Mercer, in report of December 31, 1845, speaks of alternate sections to be reserved to Republic and of propriety of making some modification of contract in relation thereto. (Rec. 178.)

In prospectus headed "Texas Colonization," signed by Mercer, as chief agent, etc., it is stated, "each alternate section is reserved to the Republic, but may be purchased for a stipulated price at any time within the five years allowed for completing the contract." (Rec. 208.)

Defendant denies in answer under oath that these surveys were made, and says "that after examination he has been able to find no evidence in the General Land Office of said State, where the same should properly be found, showing that any such surveys were ever made. (Rec. 62.) This was a vital condition precedent to be established by complainant before he could ask for lands. He stands absolutely without proof identifying his claim with any particular section or half section of land within entire colony. If surveys were ever made and returned to Land Office, why could not such important papers be found as easily as other papers of ancient date which he has been able to produce from that office and department of State? Strange that there can be found no application or request for deeds to a single foot of land in colony. Every facility was afforded. Detendant says in his answer that complainant had theretofore obtained copies of records, documents, etc., from his office, and could easily at any time before filing amended bill have obtained copies of all desired papers; that he would cheerfully, and as promptly as clerical force at his command would enable, furnish complainant such copies as he might wish, and afford him every proper facility for freest and fullest examination of all matters pertaining to contract, and action of State and her officers in relation thereto, as far as disclosed by the records in his office. (Rec. 77.)

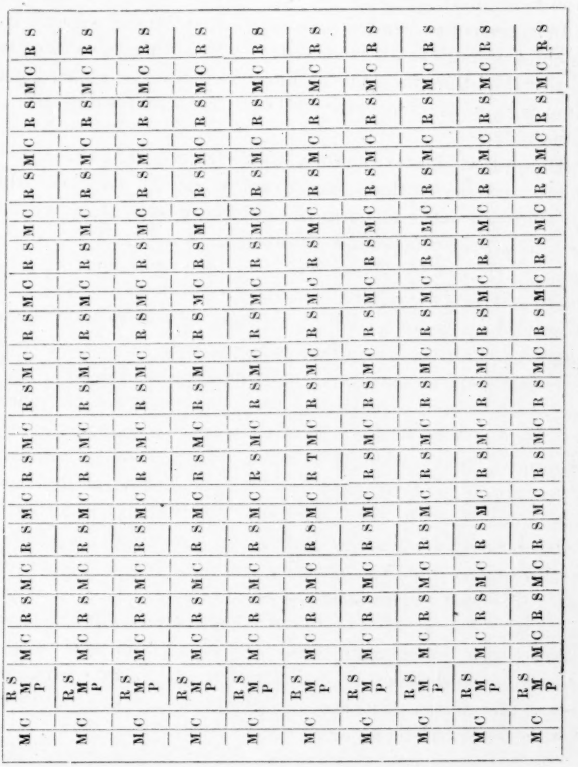
Complainant had Spence, formerly Commissioner of Land Office, to examine records, etc., therein, and Spence says:

"Commissioner Walsh did not object to my examining any of the maps or records relating to Mercer's Colony, but was perfectly willing for me to examine them, and gave me ready access to any map or paper that I wished to examine. No fee was asked or demanded, and none tendered." (Ans. to Cross-Int. 3, Rec. 260.)

Mercer and associates, *not the Republic*, were to survey lands and make proper returns, so that as they became "entitled to any section or number of sections, according to the terms of this contract, they shall be marked on said plat," etc. How could deed or patent

be made, unless *lands to be conveyed could be described?* The contract does not grant any specific lands. Survey into sections, by Mercer and associates, was necessary to segregate lands.

DIAGRAM TO ILLUSTRATE ARGUMENT AS TO INTEREST OF MERCER IN LANDS SURVEYED, ETC.



Requirment of contract as to surveys, etc., and what Mercer and associates were to do before being entitled to call on Republic or State to make deed, may be illustrated by diagram above. This supposes colony to contain 200 surveyed sections of land of 640 acres each, and that Mercer and associates had settled one hundred families thereon.

Of these 200 section, half, or 100, are *whole* sections, being the alternate or reserved sections of Republic. The other half are *di-*

vided sections belonging to Mercer and his colonists, the half belonging to colonists marked "C," and the half belonging to Mercer marked "M." By this division each family gets same quantity (320 acres) as was given by agreement to the first 119 families. (Rec., 105.) For the 100 families Mercer gets 10 premium sections selected out of those reserved to Republic—these premium sections are marked "R S M P;" the other 90 reserved sections are marked "R S," and belong to Republic. Mercer could acquire title to any of these 90 reserved sections by settling an emigrant family thereon, and by paying $640 in audited liabilities of Republic and $12 in money (Rec. 94); but the settlement and purchase of reserved sections may be left out of view, as there is no pretense that any such settlement or purchase was ever made or proposed. We have then this state of case: If Mercer settled 100 families he would have to survey 200 sections of land. The families would get half of 100 sections, say 32,000 acres: Mercer would get the other half, 32,000, and in addition thereto 10 premium sections of 640 acres each, making in all 68,400 acres; and the balance of the 200 sections, say 57,600 acres, would be reserved sections belonging to Republic.

Pursuing the illustration, Crockett's report shows that certificates were issued for 776 whole sections of 640 acres, and 479 half sections of 320 acres each, and one small fraction of 39 acres, making in all, say 1016 sections. To entitle Mercer and associates to a decree upon this basis, they ought to show clearly:

1. That they introduced from beyond limits of Republic, and actually settled within colony limits, each and all of these 1256 persons, the whole 1256, according to definition of "family" in contract, making only 1016 families, it taking two single men to make a family.

2. That they surveyed 2032 sections of land, half, or 1016, belonging equally to Mercer and colonists, and the other 1016 being reserved sections of Republic. This would give them half of each of the 1016 upon which colonists were settled, say 508 sections, and 10 premium sections for each 100 families, say 100 premium sections, selected out of reserved sections, making their whole claim 608 sections, the rest of the reserved sections, 916, belonging to Republic.

3. They ought to put their finger, by ranges, numbers, and other proper description, upon the *particular sections and half sections* to

which they were entitled, and for which they had asked conveyance.

If State, instead of giving certificate to be sold or located at option of settler, had granted 1256 *surveyed and specified tracts of land*, upon which settlers were living and had cabins, etc., there might be a pretext for considering Crockett's report as bearing on the question. His report, however, has been so fully discussed that further reference to it is unnecessary.

Mercer Contract not a Grant Vesting Title, but merely Agreement to Convey on Performance of Conditions Precedent.—There is no legislative grant from Republic or State to Mercer and associates. No grant *in presenti* was ever made. Examples of such grants *in presenti* will be found in Schulenberg v. Harriman, 21 Wall. 44; Missouri etc. Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491; Leavenworth etc. R. R. Co. v. U. S., 92 U. S. 733. Nor was any grant ever made passing to Mercer and asssoiates fee, as in U. S. v. Arredondo, 6 Pet. 691. Referring to this case in U. S v. Kingsley, 12 Pet. 476, it is said (p 485): "Arredondo's grant, confirmed by this court in 6 Peters, was a clear case of a *grant in fee* for past servvices and comendable loyalty to his sovereign, with a *condition subsequent* of a nature the performance of which must have been a matter of indifference as well to the King of Spain as to the United States after a cession of Florida was made." In Farnsworth v. Min. & Pac. R. R. Co., 92 U. S. 49, certain conditions in Congressional grant were held to be conditions precedent to a conveyance, and that conveyance before performance vested no title.

In McMicken v. 97 U. S., U. S. 204, where the court held that by reason of the non-performance of conditions in warrant of survey, claim was forfeited and became subject to disposing power of United States, Arredendo's case is again referred to, and the court (p. 216) speak of it as one "in which there was a complete grant of title with a condition subsequent," etc. Hancock v. McKinney, 7 Texas, 384, is the leading Texas case on the subject of grants, with conditions subsequent. After reviewing many authorities, Mr. Justice Wheeler says (p. 454): "Such was the character of the title in the present case. It was a *perfect title*, and needed no confirmation, either by the laws of the government under which it was issued or by the laws of nations since the change of government."

In U. S. v. Forbes, 15 Pet. 173, the court say (p. 184): "No particular land having been severed from the public domain by John Forbes, his was the familiar case of one having a claim on a large

section of country, unlocated in its nature and effect as regards the government not differing from the holder of a land warrant in the American States, which might be located by survey at any spot that was not appropriated by an individual title, in a certain district of country. In such a case, the government has ever been deemed to hold the fee unaffected by a vested equitable interest, until the location was made according to the laws of the particular country. So here, Forbes acquired no title to any land that can be recognized by a court of justice, and his claim must be pronounced void for want of identity, and because it is impossible to settle the identity and locate the land by a judicial decree." 16 Cal 194

In Davis v. Gray (16 Wall., 203), the conditions discussed were conditions subsequent. Conditions precedent as to the surveys, etc., had been performed (bottom p. 205); time had not expired in which land could be acquired (p. 229). The case at bar is nothing more than an agreement to convey upon performance of conditions precedent, and belongs to that class of cases treated of in Pomeroy on Specific Performance of Contract, sec. 334, et seq., and in Wharton on same subject, sec. 434. The Republic did not convey by legislative grant, and the President of the Republic, as we have fully shown, had no authority to convey until proof was made of perfosmance of conditions precedent, and unless the court can make a *uew contract* for parties, complainant is without remedy.

II.

The court erred in holding that articles of annexation between United States and Republic of Texas created a trust in favor of Mercer and his associates cognizable by said court.

In early stage of case, and before its full development, Mr. Justice Woods, in passing on demurrer to original bill, held as indicated in above assignment. (Rec. 338; App. 109.) After this opinion special prominence was given to this theory of case in amended bill. (Rec. 45–46.)

By resolution of March 1, 1845 (5 U. S. Stats. at L., 797) the Congress of the United States proposed the annexation of Texas as a State of the Union, upon certain conditions, one of which was:

"SECOND. Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other prop-

erty and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic, and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States." (App. 24.)

By resolution of Republic of Texas June 23, 1845 (Hartley, 46; App. 26), and ordinance of July 4, 1845 (Hartley, 47; App. 99), terms were accepted. By resolution of Congress of United States December 29, 1845, (9 U. S., states at L, 108), Texas was admitted into the Union on an equal footing with original States, and laws of United States were extended over Texas from that date. Calkin v. Cocke, 14 How. 227. In response to theory that articles of anexation created a trust, defendant insisted that at time of adoption of articles, Mercer and associates had acquired no right under contract which within true intent and meaning of said articles could be considered a liability. He insisted also that contract

"Was not, and was not intended to be, subject matter of trust, nor was any trust in relation thereto created, expressly or otherwise. That lands upon which pretended trust was alleged to have been created were lands of Republic of Texas, and never were lands of United States, and State of Texas, by the said articles of annexation, never consented to become trustee of Mercer and associates, or any one else in particular, or to hold her public domain, or any part thereof, as charged with a trust cognizable by courts of the country, but retain public domain of Republic for the object, as expressed in said articles, of applying same to debts and liabilities of said Republic, to the end that in no event should such debts and liabilities be debts or liabilities against the government of the United States. That the determination of what were debts and liabilities, and manner in which they should be established, and in what way said public domain should be applied to their satisfaction, were matters wholly within discretion of political authority of said State." (Rec. 72, 73.)

Not Purpose of Article to Create a Trust.—In construing a statute, court should transport itself back to time when passed. United States v. Union Pac. R. R., 91 U. S., 72. Adopting this rule and recurring to history of times and subsequent legislation, it is difficult to believe United States or Republic of Texas intended, by expression that Republic should retain her vacant and unappropriated lands to be applied to payment of her debts or liabilities,

to create a trust in favor of a colony contractor, whose sole right was to acquire lands by performing his contract, which a circuit court of the United States could be called on to enforce nearly a half century afterwards. No such intimation is found in the political records of either government, and no such view has ever been asserted before or held by any court in Texas. Had such idea been suggested to the statesmen of the Republic it would certainly have provoked discussion, and in all probability have defeated annexation. Texas was an *independent* republic *owning her own lands*—a very different attitude from that occupied by new States, carved out of territory belonging to the United States. If, instead of retaining her lands, Texas had ceded them to United States for purpose of meeting debts and liabilities against Republic, a moral or political trust would no doubt have been created, for the Republic (the owner) in this case would have parted with the legal title, etc. But in such case could United States have been charged in any court as trustee upon a contract like Mercer's? Besides, the trust applied solely to "*the vacant and unappropriated lands*," and lands *reserved* for colonization would hardly fall within this category. If Mercer colony was vacant and unappropriated, it was as much subject to trust in favor of others as in favor of Mercer. If not vacant it is not covered by trust. As result of trust theory State of Texas would have been powerless, after annexation, to issue a patent to a single acre of her immense public domain until she had settled with all colony contractors and persons holding her paper money, bonds, etc., notwithstanding years would be required to ascertain and adjust these liabilities. If, immediately after her admission into the Union, a circuit court of the United States had issued an injunction against Commissioner of Land Office of the State to enforce such a trust, it would have surprised the distinguished men of both governments who brought about annexation.

Colony Contract not a Debt or Liability.—The main purpose in allowing Republic of Texas to retain her own lands, instead of ceding them to United States, was to avoid liability on part of United States, and hence the expression "but in no event are said debts and liabilities to become a charge upon the government of the United States." This was the matter uppermost in minds of contracting parties. This is further shown by act of Congress, September 9, 1850 (9 U. S. Stats. at L., 446; App. 104), "proposing to

the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico."

After stating boundary, and cession of all territory exterior to limits thereof by Texas, this act proceeds:

"THIRD The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

"FOURTH. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

"FIFTH. Immediately after the Presidentof the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth artticle of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States."

The State, by act of Nobember 25, 1850, (Pasch. p. 50) accepted propositions. The legislation of the State for the purpose of ascertaining the debt of the Republic fails to include, even by implication, any right or supposed right arising under a colony contract. (Hartley, arts. 2714, 2727.)

If Mercer's contract were covered by trust on certain public domain, the United States, *one of the parties to the articles of annexation having notice of trust,* took the territory ceded by Texas under act of September 9, 1850, *supra* with notice of and subject to trust, and why may not complainant ask to have his claim satisfied out of the territory so acquired.

Trust if created enforcible only through Political Department.—If Mercer's contract were covered by trust, State being

trustee, it could not be enforced against her. 1 Perry on Trusts (3d ed.), sec. 41, citing Briggs v. Lightboats, 11 Allen (Mass.) 157. And certainly not in Circuit Court of the United States, without violating inhibition of 11th amendment. (See discussion under 6th assignment.)

The views of his honor, Judge Pardee on this branch of the case will be seen from following extract from his opinion:

"The complainant also asks an injunction to restrain the defendant, as Land Commissioner of the State, from issuing any further patents and certificates for any of the vacant and unlocated lands of the State beyond and outside of the Mercer colony limits to any person whatsoever, until the just demands of complainant, arising under the Mercer contract and the public trust created by the compact of anexation to hold the public lands for the payment of the debts and liabilities of the Republic, are fully compensated and satisfied.

"This demand involves the propositions:

"That the treaty or compact of annexation created such a trust in favor of the creditors of the Republic as could be enforced in the courts of equity. In other words, that it contemplated that any creditor might sue the State and obtain a decree for the sale of sufficient of the public lands to satisfy his demand. I doubt if any such trust was contemplated or created, particularly in the face of the inhibition of the Constitution of the United States as to the right to sue a State in the courts.

"That a great public trust was created, that the public faith was pledged that the State of Texas may be bound in morals and good faith to apply the public lands as stipulated in the treaty, I agree, but I doubt the power and authority of the Circuit Court of the United States, sitting as a court of chancery, to enforce these obligations."

Mercer's contract must be a "*debt or liability*" of Republic, or it is not covered by articles of annexation. If it be a "debt or liability," it is the debt or liability *of the State*. The State is therefore not only the *debtor*, but the *trustee*. How can trust be enforced without having trustee before the court? How can court determine existence and extent of liability without having party liable before it? If we regard the articles of annexation as a treaty, it is settled that when either of the parties engage to perform a particular act the treaty addresses itself to the *political*, and not the judicial department, and the legislators must execute the contract before it can become a rule for the court. United States v. Arredondo, 6 Pet. 691 (p. 735); Foster v. Neilson, 2 Pet. 253; Garcia v. Lee, 12 Pet. 511; United States v. Andres Castillero, 2 Black. 1 (p. 320). Chouteau v. Eckart, 2 How. 344 (p. 375); United States v. Ferreira, 13 How. 40; Taylor v. Morton, 2 Curtis, 454; Le Bois v. Bramell, 4 How.

449. In Emigrant Co. v. County of Adams, 100 U. S., 61, it is held that in the disposition of swamp and overflowed lands granted by Congress by act of September 28, 1850, and where it was charged that Iowa was violating terms of trust, "Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof or other suitable action, in a clear case of violation of the conditions." (p. 69.)

Equity cannot, any more than law, deal with obligations and corresponding rights which are purely moral, and properly and exclusively belong to the tribunal of conscience. The right in question, the invasion of which occasions the alleged wrong, must be within the purview of judicial action, must be one which the municipal law, through some of its departments, recognizes, maintains and protects. And the fact that the party has tried and exhausted every other means to obtain relief is not of itself sufficient to entitle him to a decree. Heine v. Levee Commissioners, 19 Wall., 655; Rees v. City of Watertown, 19 Wall., 107; Finnegan v. Fernandina, 15 Fla., 379; U. S. v. County of Macon, 99 U. S., 582.

III.

The court erred in not sustaining defendant's plea of res adjudicata.

By plea (Rec. 26) and in original answer (Rec. 36), and amended answer (Rec. 66, 67), defendant set up judgment rendered in District Court of Navarro county, September 25, 1848, adjudging and decreeing the contract of January 29, 1844, between Republic of Texas and Mercer and associates, null and void. This judgment reads:

"The Governor
No. 51. v.
Charles Fenton Mercer and his associates.

Be it remembered that on this the 25th day of September, A. D. 1848, there came to be holden a District Court in and for the county of Navarro and State of Texas.

Present: The Hon. R. E B. Baylor, judge of the third judicial district, James M. Riggs, clerk, and James A. Johnson, sheriff of said county, when the following proceedings were had in the above entitled cause, to wit:

The Governor
v.
Charles Fenton Mercer and his associates.

This day came the plaintiff by the district attorney, Josiah F. Crosby, and

the defendant being solemnly called, came not, *and it appearing to the court that service had been perfected*, and two terms of the court having elapsed since publication, it is therefore ordered by the court that judgment final, by default, be rendered against said defendants in favor of said plaintiff. And thereupon came a jury of twelve good and lawful men, to wit, Daniel White, William Richey, William Billingsley, Peter Stout, Henry Cook, John Treadwell, Elias McKay, William L. Browning, B. L. Hain, Thomas J. Tinery, James Cox, and G. W. Senior, who, being duly elected, empanelled, and sworn the truth to speak, upon their oaths do say: "We, the jury, find the facts and allegations in the petition to be true." And therefore it is ordered, adjudged, and decreed by the court that the contract of colonization, made and entered into between Sam Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the 29th day of January, eighteen hundred and forty-four, be and the same is, hereby adjudged and decreed null and void. And it is further ordered that the plaintiff recover his costs, for which execution may issue.

[Signed,] R. E. B. BAYLOR,
Judge, &c."

It is provided in section 1, of ordinance of August 27, 1845, as follows:

"SECTION 1. That it shall be the duty of the Attorney-General of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas, and if upon such investigation it shall be found that any such contract was unconstitutional, illegal or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void." (Hartley 84; App. 100.)

This ordinance is of equal authority with the Constitution of 1845, to which it is appended. (Stewart v. Crosby, 15 Tex., 546.)

By section 13, of act of May 11, 1846, it is provided:

"That it shall be the duty of the Attorney-General of this State to file the petition or information, and institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate" (Hartley, art. 77; App. 101.)

It is under authority of ordinance and act aforesaid suit was instituted and decree rendered, and decree is recognized by Legislature in act of January 24, 1852, in which it is

"*Provided*, That no such certificate shall be located without the limits of the territory generally known as Mercer's colony, prior to the rendition of the decree of twenty-eighth day of October [September] A. D. eighteen hundred and forty-eight, by the District Court of Navarro county." (Laws 1852, p. 35; App. 106–107.)

Crosby, district attorney, and Riggs, clerk, whose names are mentioned in judgment, were examined as witnesses. It appears from Riggs' testimony (Rec. 315) that the court house where judgment was of record was destroyed by fire November 13, 1855, so that defendant could not obtain complete copy of all proceedings. Copy of petition, amended petitions and orders and judgment of court in evidence were made and certified to September 12, 1854 (Rec. 326), and do not purport to be a *full copy* of all the proceedings. Riggs fully proves the pendency of the suit, and says:

"The defendants appealed the case to the Supreme Court, and I made out two transcripts, one for the defendant's attorneys and the other for the Attorney-General. These transcripts I sent to Austin, and do not know what became of them. The original papers, I think, were destroyed by the fire. I have stated my means of knowing in answer to fifth interrogatory." (Rec. 316.)

In his answer to fifth interrogatory he states court house burned November 13, 1855; that he was living in the town at the time. (Rec. 315 and 316.) Riggs is uncertain as to whether any counsel represented defendant in the suit. Crosby, after stating he was District-Attorney, etc., says that he has a distinct recollection of the suit; that he had frequent conferences with the Attorney-General of the State in relation thereto: and to interrogatory 5 he answers:

"I did appear in said suit in behalf of the State under the instructions of the Attorney-General, John W. Harris, and was recognized as the leading counsel in the prosecution of said suit. I believe that the records will show that said suit was formally and properly brought and conducted, resulting in a judgment and decree in favor of the State of Texas and against the said Mercer and his associates. I don't now remember who were the counsel appearing in the case for the defendants. My remembrance is that such papers as were filed in the cause were signed by William G. Hale as attorney for the defendants. Hale, according to my remembrance, was not present at the trial, and, as I remember, such counsel as were present made no special effort in the case because of the absence of Hale and the want of a knowledge of the line of defense intended to be adopted by Hale." (Rec. 305.)

It seems that Hale was an attorney of Hancock's in 1853—selected,

as it may be supposed, because of his former connection with the matter. (Rec. 115.)

To the 7th Interrogatory he answers:

"Said suit was tried in said court. I have stated my connection with it. According to my remembrance, it was either at the spring or fall term of 1848. The record of the case will show better than my memory, whether the suit was tried solely by the judge or by a jury also. My impression, however, is that upon consultation with associate counsel, a jury was called and a verdict upon the facts rendered by them. I will state also that I was assisted in the prosecution of the case in behalf of the State by the Honorable James Willie, now deceased. I do not recall at this time the names of defendant's counsel." (Rec. 306.)

To the 8th Interrogatory he answers:

"Yes. There was very considerable evidence adduced upon the trial by the plaintiff. My remembrance is that the facts were fully gone into, and abundant evidence introduced, upon which it was deemed essential to base the verdict and decree. I don't now remember the names of all the witnesses who testified in said case, but I know that there were quite a number of witnesses who were fully examined as to the facts sought to be established by the State in forfeiture of said so-called Mercer Colony contract. Their names I cannot recollect, nor can I say whether they are living or dead. (Rec. 306.)

To the 9th Interrogatory he answers:

"My remembrance is that the witnesses were numerous, and that they were fully interrogated, and answered as above. The witnesses were questioned, and gave answers touching all the allegations made in plaintiff's petition. We were satisfied that the evidence as to forfeiture of the said contract was conclusive before the case was submitted." (Rec. 306.)

In answer to 11th Interrogatory he states that he is under the impression that care was taken to preserve testimony adduced on the trial by writing the same down and having it signed by the witnesses and attested by the clerk of the court, but of this he is not confident. (Rec. 306, 307.)

As to the 12th Interrogatory he answers among other things:

"I am satisfied that there was a statement of facts made up in the case, as it was expected that an appeal would be taken by the defendants, and it was deemed prudent to preserve the facts in the case as a guard against the contingency of death of some of the witnesses." (Rec. 307.)

And, in answer to 4th cross-interrogatory, he repeats that "the statements of facts were made up for the reasons stated in my former answer." (Rec. 308.)

His honor Judge Pardee, in his opinion, found:

"That while the ordinance adopted by the Convention in 1845 (Hartley's Digest, p. 84), after ratified by a vote of the people, may have conferred power upon the law officers of the State to sue for, and jurisdiction on the courts to enforce, forfeitures of the colonization contracts, yet that the proceedings had and the judgment rendered in the district court of Navarro county, in the years 1847 and 1848, wherein A. C. Horton, acting governor, for the benefit of the people of Texas, was plaintiff, and Charles Fenton Mercer and associates unknown, were defendants, were absolutely null and void for want of legal notice to the defendants." (App. 129.)

The court house, as already noticed, containing original papers, was destroyed by fire, and defendant was compelled to rely on partial copy, in connection with evidence of Riggs and Crosby, as the best evidences attainable. (Cornett v. Williams, 20 Wall. 226.)

The law in reference to service on non-residents at time this suit was brought provides—

"That when it is alleged in the petition, or appears in the course of a suit, that any defendant is not an inhabitant of the State, that he is absent therefrom, or that he is a transient person, upon the plaintiff, his agent, or his attorney, making affidavit to the truth thereof, it shall be the duty of the clerk to issue a citation or writ to the sheriff, or other proper officer of the county, setting forth therein, in addition to the requisites of an ordinary citation, a brief statement of the substance of the petition or suit in which the same is issued, requiring him to cite the defendant by making publication of the citation in some newspaper published in the county, if there be one, but if not, then in the nearest adjoining county where there is one, for eight successive weeks previous to the return day of such process." (Hartley, Art. 676.)

An affidavit was made by district attorney that Mercer was a non-resident of State and beyond jurisdiction of court, and that his associates were unknown. (Rec. 324.) Process was issued by clerk of court to sheriff July 12, 1847, as follows:

"You are hereby commanded to summons Chas. Fenton Mercer and his associates unknown, to be and personally appear at and before the Hon. District Court of said county at the next term thereof, to be holden at the late residence of Wm. R. House, in said county, on the third Monday after the first Monday in October, A. D. 1847, by publication as the law directs, in the Northern Standard, then and there to answer the petition of Albert C. Horton, Governor of the State of Texas, acting in his official capacity in behalf of the people of said State, filed in said court against him, a copy of which petition accompanies this writ." (Rec. 324.)

Above process is endorsed, "In obedience to the command of the above writ I order the same with the accompanying petitions to be

published in the Northern Standard eight successive weeks," James A. Johnson sheriff N. C. (Rec. 325.) The judgment, as we have seen, recites, "*And it appearing to the court that service had been perfected,*" etc.

The recital in the judgment with what appears on the record is sufficient. Hall v. Law, 102 U. S. 461, citing Voorhees v. Bank of U. S., 10 Pet., 449; Thompson v. Tolmie, 2 Pet., 157; Comstock v. Crawford, 3 Wall. 396; Hatch v. De La Garza, 22 Tex., 176; Lawler v. White, 27 Tex., 250; Yturri v. McLeod, 26 Tex., 84; Mitchell v. Menley, 32 Tex., 460.

The judgment under consideration was rendered long before the adoption of the Fourteenth Amendment, it is not therefore to be tested by the inhibition therein contained as to due process of law, etc., as in Pennoyer v. Neff, 95 U. S., 714 (p. 733).

IV.

The court erred in not sustaining defenses of stale demand laches and acquiescence.

Stale demand was set up by demurrer (Rec. 11), and laches of Mercer and associates was fully presented in original answer (Rec. 37), and in amended answer. (Rec. 75, 76. See Statement of Case, pp. 21, 29.)

Evidence as to Laches, etc.—Mercer and associates were not required to wait until expiration of contract (January 29, 1849) before demanding lands. They were entitled to ten premium sections whenever they settled 100 families, and to a portion of each section on which a family was settled, upon making proof of settlement, surveys, etc., and identifying land for which they asked conveyance. They claim to have settled not less than 100 families each year (Rec. 2), and more than 119 families the first year, as per Statement of Pillans et al. (Rec. 4), and 1256 familes, as per Crockett's Report (Rec. 6), during the five years the contract had to run. *There is no proof that Mercer and associates, or any one claiming under them, ever demanded conveyance for any premium section or any portion of a section upon which they had placed a settler.* On the contrary, Hancock, for self and associates, admits in his memorial to Legislature of Texas that they had *abandoned their claims to lands within limits of colony* (Rec. 241), and in letter to Cabell in 1869, Han-

cock says his claim "stands as it did when I was last in Austin, subject to *the action of the Legislature.*" (Rec. 203.) The suit which it was designed to bring at one time for the purpose of alarming settlers and forcing Legislature to pass act to satisfy claim, was never brought. (Rec. 114.) Their attorneys advised them what was necessary, etc., telling them: "*We must not delay too long a time, or our bill will be subject to the charge of being stale.*" (Letter of Paschal and Duval, Rec. 115, 116.) Their attorneys knew of the judgment of district court of Navarro county, of issuance of certificates by Crockett, and that lands in colony were regarded as vacant and being located upon. (Mem. of Duval, Rec. 204.) See also memorandum signed "Geo. W. Paschal," in which the judgment forfeiting contract is spoken of, and in which it is admitted that Paschal and Duval were employed in 1853 (Rec. 268), and in connection therewith letter of T. M. Harwood (Rec. 268, 269).

In the act of January 24, 1852 (App. 106), said judgment is expressly mentioned. Pillans, who left Texas in 1849, knew of this judgment. (See 21st Interrogatory, Rec. 158; and answer thereto, Rec. 166.) Riggs, clerk Navarro District Court, says he made out a transcript of the case for defendant's attorneys. (Rec. 316.) Lawrence, who was lawyer and land agent in Texas since 1847, says:

"So far as my knowledge of locations of land within the limits of said colony extends, no regard has been paid to the claims of said colony. Locations were made and patents issued the same as on land in other portions of the State. I have located land in Navarro county, within the limits of said colony, and never heard of any protest or objection on the part of Mercer or his associates." (Rec. 251–252.)

De Cordova, a land agent in Texas for 32 years—

"From 1848 until the institution of this suit I was not aware of any obstacle to the location, surveying and procuring of patent to any vacant land within the limits of the country embraced within the lines of Mercer Colony as designated on Pressler's map of Texas. The lands within those limits were always treated as vacant and unappropriated lands subject to location, and I have received patents from the Land Office on lands located in said limits. I never heard of any protests of Mercer or any of his representatives until the filing of this suit." (Rec. 254.)

Spence, formerly Commissioner of Land Office, and land agent in Texas—

"Up to the time of filing this suit, the lands which are now represented to be in Mercer Colony were located, surveyed, pre-empted and patented regardless of the contract with Mercer. It was understood and considered that the contract was for-

feited, and that the limits or boundaries called for were so indefinite that it could not be accurately, or with any certainty, known what territory was actually embraced in the colony, and for years the Land Office, county surveyors, and the people generally, acted as if no such contract existed, and the lands were surveyed and patented regardless of it."

Chambers, a resident of Texas for 43 years, and a surveyor, familiar with Colony, says: "It was generally understood contract was forfeited." (Rec. 267.) The foregoing is all from complainant's own testimony. To same effect is testimony of defendant's witnesses, Terrell (Rec. 274), Young (Rec. 279), Martin (Rec. 281), and Crockett (Rec. 299). Looking to the *proofs* and not the unsupported statements in the bill, the conclusion is unavoidable that Mercer and associates, acting upon the opinion of their attorneys, that they had "no remedy but by appeal to the Legislature" (Rec. 268, 269), deliberately *abandoned* all purpose to sue, and that Hancock spoke truly when he so stated in his memorial to the Legislature. (Rec. 241.)

Defense good as against Trust.—The case as now presented in *the light of the subsequent pleadings and evidence* is very different from the case as presented on demurrer to original bill—the demurrer admitting *facts stated in bill* to be true. The ground upon which Mr. Justice Woods overruled demurrer was that express trust was created by Articles of Annexation, and that the defense as between trustee and *cestui qui trust* could not be made, and further that if it could bill offered reasonable excuse for delay. (App. 118, 119.) His Honor Judge Pardee held he was committed by opinion of Mr. Justice Woods on this point (App. 122), thus cutting off consideration of these defenses on final hearing, notwithstanding the different phase of case and the evidence to which we have adverted. Under 2d assignment we maintained there was no such express trust. But if there were, we insist that the defense is complete, because the trust was long since abandoned and renounced.

Melton v. Cobb, 21 Tex., 539, decided in 1858, was mainly relied on to show that State acknowledged (not the fact that the contract was valid) but that the claim of Mercer and associates based upon performance of its conditions was good, etc. In other words, that it was authority for existence and continuance of rights based upon trust relation. This case was an action of trespass to try title (ejectment) *between private individuals, neither the State nor any officer thereof being a party thereto.* The *facts* (and it is important

to keep these in view, especially as to the *nature* and *dates* of respective claims) were as follows: Melton, who was plaintiff, located portion of his headright certificate, and had survey made on land in controversy February 3, 1846. The reservation under Mercer contract was not to expire until January 29, 1849, unless sooner forfeited, etc. Cobb, the defendant, claimed that in June, 1846 (also several years before Mercer contract was to expire, and before decree of Navarro court), he settled on same land as settler under contract with Mercer; that land was within colony; that at time of introduction into colony and entry on land (June, 1846) he was and still is head of a family; that in said year (1846) he built houses on said land, and before 1848 cultivated and put under fence at least fifteen acres of land; that John M. Crockett, who was commissioner under act of February 2, 1850, issued him a headright certificate for 640 acres, which he *located and surveyed upon and around his improvements.* On trial Melton proved certificate and survey in 1864, as above stated. Cobb proved certificate from Crockett, his survey thereunder; that he settled on land in 1846, and that it was within colony. He offered in evidence Mercer contract, and also proved by a witness that he had seen a notice from the Commissioner of Land Office (when is not stated) to surveyor of land district including land in controversy, not to survey any more land in Mercer's colony, and that this notice was given before the survey was made for plaintiff. This evidence about the notice was objected to by Melton, and objection overruled. Judgment (the case being tried by the judge without a jury) was given against Melton and in favor of Cobb, and Melton appealed.

Melton assigned but two errors:

1. That the court erred in admitting the evidence objected to, *i. e.* the statement of the witness that he had seen a notice about making no more surveys in the colony, etc.

2. That the judgment was contrary to the law and the evidence.

It was contended by Melton that Mercer contract was invalid for want of authority on part of President of Republic to make it, etc. On this point it was held that the authority to make the contract and reserve the land for *three years* was undoubted, and that if reservation had been for three instead of five years, that period (three years) had not elapsed when Melton's location was made, and that land was not subject to location at date of Melton's attempted appropriation of it. But the court said it was *not necessary* to decide

this question, for the reason that contract was recognized as valid by subsequent legislation. (Citing acts of February 3, 1845, and June 25, 1845, and Houston v. Robertson, 2 Texas, 1, and Hancock v. McKinney, 7 Texas, 384.) It seems also to have been contended by Melton that as act of February 3, 1845, required Mercer to survey and mark his colony, and act of June 25, 1845, authorized patents to issue on surveys within colony made previous to notice to the surveying of the limits of the colony, his (Melton's) survey was protected.

The court was inclined to opinion that act of June 25, 1845, was intended to protect locations *previously made*, and not those thereafter made, as was Melton's; but whether within or without provisions of said act, that the requisite notice to the surveyor had been given. They say, "it is to be observed, moreover, that there is *no evidence* that the limits of the colony were not defined and marked by an actual survey, as the law required; nor is it pretended that the surveyor did not know that he was making the survey within the limits of the colony; the inference from the evidence is that he did."

Melton, it seems, also contended that Mercer and associates had forfeited their rights by failure to perform the requirements of the law and their contract; "but of this," says the court, "*the record affords no evidence.* If the plaintiff would or could have availed himself of any benefit in this suit by reason of such forfeiture, it certainly devolved on him to aver and prove it. But however the fact may have been, *it cannot affect the rights of the defendant as a colonist.* In the contract and laws under which it was made, *the rights of the colonist are protected* from the influence of forfeiture on the part of the contractor. All the legislation upon the subject, including the ordinance which denounces the contracts, contains the fullest and most ample guarantees and provisions to *protect the colonist* from injury by reason of any default or forfeiture by the contractors." (Citing Hart. Dig., Arts. 2016, 2147; Ordinance, sec. 1; Act of February 2, 1850; Hart. Dig., Art. 2309 *et seq.*) "The defendant," continues the court, "is within the protection of these provisions. He was an *actual settler* upon the lands he claims as a colonist, as early as June, 1846; *he made the requisite proof and obtained his certificate as a colonist under the act of 1850*, and procured the land to be surveyed in the same year. He has done all that was requisite to entitle him to the benefits secured by law to

colonists. But if he were wholly *without title or right*, the plaintiff (Melton) must recover upon the strength of his own title; and having failed to show a valid title, the result must be the same. We are of the opinion that there is no error in the judgment, and it is affirmed."

If we concede that opinion of Supreme Court in a suit between *private parties* could have the effect of binding or estopping the political department of the State, there is nothing in this case which holds that the State had admitted that Mercer and associates had performed their contract.

No one will contend that in a controversy *between the State and the contractors* it would have force as res adjudicata or otherwise. The admission of the existence, or even validity, of a contract is a very different thing from the admission of the performance of its conditions. Nor is it to be supposed that the able court pronouncing this opinion was ignorant of the judgment of the District Court of Navarro county, or of the provisions of the ordinance of August 27, 1845, which took it out of power of State to relieve contractors.

The judgment of the Navarro District Court (p. 61-62 ante), and its subsequent recognition by the State and its officers, as stated in the answer, if good for no other purpose stands as renunciation and denial of trust. This view is strengthened by its recognition in act of January 24, 1852. (App. 106.) The issuance of patents by the State to lands within colony, without regard to rights of Mercer and associates, is admitted in bill and shown by testimony. The passage of act of February 2, 1850 (App. 101), under which certificates were issued to 1256 persons residing within colony, for the *whole quantity of land*, without regard to any claim of Mcerer and associates, is equally conclusive thereof. If A agree to convey land to B, and afterwards, in disregard of any assertion of right on part of B, convey land to C, this is a breach of and renunciation of trust relation. (2 Perry on Trusts, 3d ed., 864, and authorities cited in note 3, p. 512.)

In Hume v. Beale's Executrix, 17 Wall., 336, it is said (p. 348):

"Whether Beale, under the deed of Benjamin Berry, was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further, it is not important to determine. In any aspect of the case, there has been such gross laches on the part of the *cestui que trusts* that they have disentitled themselves to the relief which they seek to obtain. It is an established rule with courts of equity, indepen-

dent of any statute limiting the time in which suits can be brought, that they will not entertain stale demands. This rule is necessary from consideration of public policy, and because it is impossible to do entire justice when the transactions sought to be impeached have become obscure by lapse of time and the evidence on the subject is liable to be lost. Story, referring to the rule imposing diligence upon parties seeking relief, says: 'Hence, if there be a clear breach of trust by a trustee, yet, if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose. This rule requiring the party injured to seek redress in reasonable time, has so often received the sanction of courts of equity in this country and England, that it is unnecessary to cite authorities to sustain it."

See also as applicable to case at bar the following authorities—2 Story's Eq., sec. 1520.

2 Perry on Trusts (3d ed.), secs. 863–864.

Holt and Wife v. Rogers, 8 Pet., 420.

Boone v. Chiles, 10 Pet., 177 (pp. 222–223).

Preston v. Preston, 95 U. S., 200.

Merriam v. Hassam, 14 Allen (Mass.), 516.

Pomeroy's Specific Permormance of Contracts, p. 474 and notes.

3 Leading Cases in Equity, Hare and Wallace's notes (3d Am. from 2d London Ed.), p. 80.

Turner v. Smith, 11 Tex., 620.

De Cordova v. Smith, 9 Tex., 129.

Glasscock v. Nelson, 26 Tex., 150.

Hudson v. Wheeler, 34 Tex., 356.

McMasters v. Mills, 30 Tex., 591.

We do not dispute the doctrine in McKin v. Williams, 48 Tex., 89, referred to by Mr. Justice Woods (App. 119), that even after the lapse of ten years there is no fixed rule prohibiting relief if the circumstances of the case sufficiently account for and excuse the delay. In equity as well as law the general rule is that the cause of action arises whenever the party is entitled to bring suit, or as soon as he has a right to apply to a court of equity for relief. (2 Story's Eq. Jur., sec. 1521*a*; Smith v. Fly, 24 Tex., 352.)

In case at bar rights of Mercer and associates began to accrue in 1845, and must all have accrued by January 29, 1849; making the delay to sue from 20 to 25 years before the late civil war. Circuit Court of United States was open in Texas June, 1866 (Masterson v.

Howard, 18 Wall., 99); the bill was not filed till 9 years afterwards.

The answer under oath denies, and there is no proof to the contrary, that any means were ever used by State of Texas, or any of her officers, to conceal from Mercer or his associates, or any one claiming by, through or under them, any of the facts, matters or records pertaining to said contract, or the acts of said State or any of her officers in relation thereto. (Rec. 122.)

Complainant must show reasonable diligence—and the means of knowledge are the same thing in effect as knowledge itself—and the delay which has occurred must be shown to be consistent with the requisite diligence. Wood v. Carpenter, 101 U. S. 135; re-affirmed in Nat'l Bk. v. Carpenter, id. 567. In case of a trust, it must be *clearly* established. It must be shown that the facts have been fraudulently and successfully concealed by the trustee from the *cestiu qui trust*, and the bill must specifically show what were the impediments to an earlier prosecution of the claim—how party came to be so long ignorant of his rights, and means used to fraudulently keep him in ignorance, and how and when he first came to knowledge of his rights. Badger v. Badger, 2 Wall 87; see also Godden v. Kinnel, 99 U. S. 201. Laches and stale demand may be set up by officers of State of Texas in her behalf. Power v. State, 41 Texas, 102; see also Patrick v. Nance, 26 Texas, 298. And limitation may be pleaded aganist State. Governor v. Burnett, 27 Texas, 32.

Where vendor gives bond for title or other agreement to convey land, limitation commences when there is some act on part of vendor indicative of intention to hold adversely to vendee or those claiming under him. Sale to another constitutes hostile act.

Early v. Sterrett, 18 Texas, 113.

Ten years in such case a sufficient bar.
Yeary v. Cummins, 28 Tex. 91.
Carlisle v. Hart, 27 Tex. 350.

A *cestiu qui trust* may be debarred from relief by long acquiescence in breach of trust, though he did not originally concur in it. 2 Perry on Trusts (3d ed.), secs. 850, 870.

When a trustee has closed his trust relation to the property and to the *cestui qui trust* and parted with all control of the property, the statutes of limitation run in his favor notwithstanding it is an *express* trust. Clarke v. Boorman's Executor, 18 Wall. 493; Merriam v. Hassam, 14 Allen, 516.

If complainant held a $1,000 past due bond of Republic, he would have an unquestioned debt or liability of Republic. If under the law of the State or principles of equity this debt was barred, could not the officers of the State in a suit to subject the public domain of State as a trust to satisfy this stale and barred claim, set up facts in defense? Would it not be the duty of a court of equity, upon the facts of this case, if such claim were now presented, on its own motion, even without the defense, to withhold relief?

V.

The court below erred in holding that complainant had shown such interest in subject matter of suit and such title in himself as to authorize decree in his favor.

Complainant must show not only an interest in subject matter of suit, but must also make it appear that he has a proper title to institute a suit concerning it. 1 Danl. Chy. Prac. (5th ed.), 318. Allegation that title is complete not sufficient, all preliminary steps must be averred. Id. 320; Story's Eq. Pl. (9 ed.) secs. 257, 257*a*, 258, 259, 260. Equity will not relieve where complainant shows he has no title or interest in subject matter in dispute. Seltz v. Unna, 6 Wall., 327.

Applying these tests, it will be convenient to consider: (1) How under their contract Mercer and associates were to be represented in their dealings with Republic. (2) Character in which Preston sues and rights which he claims to represent. (3) Want of interest, title and authority, in law and upon proofs, on part of Preston to maintain suit or obtain decree.

How Mercer and Associates were to be represented in dealings with Republic.—Contract between Republic and Mercer contains following:

"And it is further mutually agreed between the parties to this contract, that until the party of the second part, and such associates as they may make by transfer or assignment of a part or parts of their interest in this contract and the lands set apart thereby for colonization on the terms and conditions herein expressed, shall obtain a charter or act of incorporation from the Congress of this Republic, they shall be authorized to appoint, by a majority of their number *in interest*, in such mode and by such title or denomination as a majority in interest of the said association may agree on, in some instrument

of writing or articles of agreement and association to be drawn up and subscribed by such majority, some one or more person to act under a common name to be assumed by the said association, and, under such instrument of writing, to invest such person or persons with full authority as their trustee or trustees, to receive and hold, for their benefit and on their behalf, according to such rules as they or a majority in interest of their company or association may prescribe, in writing, from time to time, the titles and convevances of such lands, bonds, obligations, notes or money, as they shall agree, by a majority in interest of their number, to confide to the keeping or to the use of their said trustee or trustees.

* * * * * *

"And within six months from the date hereof, and once within every six months thereafter, until such act of incorporation shall have been obtained, the association formed as aforesaid shall transmit a list of their co partners, and a statement of the share or shares of each in the stock or property of the association or company, and of the common name or title assumed by them or a majority of them in interest, to the said department." (Rec. 97; App. 12, 13.)

No act of incorporation, as contemplated by contract, was obtained, nor do proofs disclose any efforts to procure one. Fact that such specific provisions were made on subject shows importance attached by Republic and Mercer to definite understanding as to how Mercer and associates were to be represented. There being no law in Texas investing joint stock companies or associations with privileges of corporation, such powers, which could eminate only from sovereignty, could not be conferred by mere contract. *Houston and Mercer could not make law.* Mercer and associates, in absence of incorporation, were simply a partnership. (Angell & A. on Corp., 10 ed., sec. 591, p. 599; 1 Lindley on Part., Ewell's ed. of 1881, marginal p. 3; and note 2, id. marginal p. 1083 et seq.)

Character in which Preston sues, and rights which he claims to represent.—Original bill, referring to requirements of contract, as quoted by Hancock, contains following:

"And your orator says that a joint stock association, styled the Texas Association, was organized as before stated, and duly reported to the Government of Texas under the name of the "*Texas Association*," and by the act of a majority of their number in interest they did assume said name in articles of agreement and association, a copy whereof will be filed herewith, duly executed, adopting said name and investing Charles F. Mercer with full powers to act as trustee and chief agent, as therein declared, and to bind said association; and Charles F. Mercer did continue to act as such until the day of , A. D. 1852, when he sold and assigned his interest in the property of

said association for value received to your petitioner, who was duly chosen and appointed trustee and chief agent, in the place of said Mercer, and with all his powers, and who entered upon said trust and accepted the same, and continued to act as chief agent and trustee of said Texas Association, up to the present time. And your orator says that the shareholders are numerous, and, as far as he is informed, beyond the jurisdiction of this court, and that it would be impracticable to make them parties to the proceedings." (Rec. 5.)

Preston alleges that Hancock was duly appointed chief agent of association, and was continuously recognized by association as its chief agent and trustee to date of his death, which occurred on the —— day of August, 1875. That Hancock made and published his last will and testament, which was duly admitted to probate and recorded in proper office in county and State of his residence, to-wit, in Jefferson county, Kentucky. That by 8th clause of said will, in execution of powers conferred on him as chief agent, Hancock did by virtue of contract and agreement of association nominate and appoint him (Preston) in his stead to act as chief agent and trustee, and to maintain and prosecute its claim or any suit or action based thereon, and to revive same, and to do all things which he, the said Hancock, could do under said agreement of association and contract, and did also bequeath and devise unto your orator all the right, title and interest of him, the said Hancock, in and to all his estate, stock and property in said Texas Association, upon the trust therein set forth. A copy of the said will, duly certified, is herewith filed and is made a part hereof, marked "T."

He further says that he did immediately enter upon the office and duty of chief agent and trustee of and for said Texas Association, and has ever since so acted, and he is now said chief agent and trustee, and has been and now is recognized as such by said Texas Association and by the members thereof.

And that by the bequest and devise to him as aforesaid he has an interest large and controlling in amount in the rights and property of the Texas Association. (Rec. 17–18.)

Walsh, in sworn answer, which was *not excepted to*, sets up want of interest and title in Preston thus:

"And this defendant denies that the complainant, William Preston, by whom this suit is now prosecuted, has any right or interest in the subject matter of this litigation, or that any authority, right or interest, legal or equitable, has ever been devised or granted to or conferred upon him in accordance with the aforesaid terms and provisions of said contract, to maintain this suit or obtain any relief herein."

Upon issue so raised evidence was admitted and question discussed and passed on by court.

Preston without Interest, Title or Authority to Sue or obtain Relief.—Preston, as we have also seen, derives his claim as chief agent, etc., solely from 8th clause of will. This clause recites:

"*Eight.*—Now, *by virtue of the powers created in said contract* and in the articles of association of said Texas Association, I hereby nominate and appoint William Preston in my stead to act as chief agent and trustee of said Texas Association, and to maintain and prosecute said claim, or any suit or action *bond* thereon, and to *revive* the same, and do all things which I would do under said contract and articles of association according to the terms and provisions thereof and of said contract of colonization; and if he should fail or refuse to act, then that he shall have power to nominate and appoint a new trustee or chief agent of said Texas Association, and I hereby devise and bequeath all my right, title and interest in, and all my estate, stock and property in said Texas Association to William Preston, *upon condition* that he shall pay over one-half of whatever may be realized or received from said Texas Association to my wife, Mary D. Hancock, her heirs and assigns, or that his appointee or their successors shall pay over one-half of any amount realized and received from said Mercer Colony claim." (Rec. 108, 109.)

To reading of will in evidence defendant objected, because—

"1. The said instrument was never probated in the State of Texas. 2. Because the said instrument confers upon complainant, Wm. Preston, no right to prosecute this bill. 3. Because the said Wm. Preston can take no right or interest in or under the contract upon which this suit is based under said pretended will." (Rec. 333–4.)

In reply to objections, Judge Pardee says in his opinion—

"As to the first point, it is shown that Hancock was chief agent in accordance with the articles of association, with power to substitute; that he died, and in his last will and testament transferred his shares to Preston and appointed Preston chief agent. It is shown that Preston assumed the duties of chief agent, and that his assumption has been approved and ratified by the other shareholders.

"Any defect of Preston's authority to represent the association has been cured by ratification. It is elementary in the law of agency that ratification of the acts of an agent amounts to as much and has the same effect as an original appointment." (App. 127.)

His honor seems to overlook the *contract* and to rely on *articles of association.* Contract provides that association until it obtains charter "*shall be authorized to appoint by a majority of their number in interest in such mode and by such title or denomination as a*

majority in interest of the said association may agree on in some instrument of writing or articles of agreement and association to be drawn up and subscribed by such majority."

No articles subscribed by a majority of association were in evidence. No articles containing name of any chief agent or trustee were in evidence. A blank copy (Rec. 143) and a copy of articles of association purporting to be signed by Mercer and one Taylor (Rec. 210) were in evidence, and it is to these his Honor must refer. If admissable for any purpose, they could only be used *between the members of the association*, for it is not competent for the members of the association by agreement *inter sese* to alter terms or absolve themselves from requirements of contract with Republic, nor will any *ratification* by a portion of the members of acts and authority of another accomplish this result. (Angell and A. on Corp., 10 ed., p. 602; Lindley on Partnership, Ewell's ed. of 1881, marginal p. 1083 *et seq.*) But as articles of association are relied on to support legality of Preston's appointment as chief agent, etc., we extract, therefrom, as follows:

"And the said party [referring to Mercer], moreover, binds himself to provide, as soon as practicable, one or more suitable and trustworthy persons to act, in the order in which they shall be named, as chief agents of the association to be formed as aforesaid, in event of the death, sickness, inability from any cause, or disinclination further to act, of him, the said party of the first part to this agreement.

* * * * * *

"The names of the persons appointed as aforesaid, to succeed the party of the first part as chief agent in case of his death, disability, or declining to act, shall be transmitted to the Department of State of the Republic of Texas, to be there filed or recorded for the information of all persons interested therein; and shall be in writing subscribed by the party of the first part to this agreement; and from the time that some one of the persons so named and entitled by priority to act shall enter upon the duties of chief agent, he shall have all and every power vested by this agreement in the said party of the first part thereto.

* * * * * *

"The party of the first part, so long as he continues to act as chief agent of the association hereby created, and each of his successors, so long as he shall act as such, shall have every power necessary or expedient for carrying into effect the agreement of the twenty-ninth of January, 1844, and this agreement."

Neither in these extracts nor elsewhere in articles of association, do we discover authority of any agent appointed by Mercer to substitute another in his place. Hancock, in his will, not only attempts

to substitute Preston as chief agent, but goes so far as to authorize Preston to appoint some one else in his place if he should refuse to act, thus establishing, without regard to the wishes or rights of the shareholders or any one else, a sort of *apostolical succession.* Under articles of association only Mercer has power to appoint, and appointment is to be made in writing, subscribed by him, and names of his appointees are to be returned to Department of State. This, though perhaps good as between members of association assenting thereto, is not good as to Republic or State. By express provisions of contract Republic or State is not called upon to recognize or respond to demand of any one claiming to be chief agent or trustee unless appointed by a *majority in number and interest of members of association in such mode as a majority in interest might agree on in articles of agreement or association to be subscribed by such majority.* The instrument to name the agent and define his powers.

There is no such agreement appointing Mercer or Hancock chief agent and trustee, and Preston does not pretend that there was even an attempt, so far as he is concerned, to comply with requirements of contract in this respect. He relies upon Hancock's will as source of his power and authority. It is true Hancock alleges that he was duly chosen and appointed trustee and chief agent in the place of said Mercer, but there is no evidence as required by contract to support his allegations in this behalf. An appointment should be shown in manner and form as called for by contract.

If Hancock were legally constituted trustee of association he could not delegate his trust unless by express authority in instrument creating it. 1 Perry on Trusts (3d ed.), sec. 287; 1 Sugden on Powers (3d Am. from 7th Eng. ed., 1855) p. 266. No instrument has been produced showing such authority. Hancock says, in his will, that he appoints Preston "by virtue of the powers created in said contract and in the articles of association," etc. In this he assumed to execute a power which never belonged to him and in a manner wholly unauthorized.

Are shareholders, who are not parties to this suit, bound by such representation? Are they bound by the decree? Can State or any officer of State plead decree as *res adjudicata?* And, just here, a serious question suggests itself. The interest of the shareholders (of which, according to the evidence, there are a considerable number, and some of whom have died), is the property of the shareholders and their heirs, and any attempted divise by Hancock of

that which *belongs to other people* is of course void. If lands, or an equitable interest therein, Hancock, to extent of his interest, would only be tenant in common. Republic contracted with Mercer and such associates as he should choose, *their executors, administrators and assignees, or legal representatives.* In articles of association, Mercer, for himself and associates, and for his and their legal representatives, covenants and agrees with shareholders and their legal representatives. (Rec. 144 ; App. 17.) Articles make no provision as to interest of deceased members, leaving rights and relations of living, and heirs of deceased members to be regulated by law of partnership. It is not in proof that all, or any considerable number, of shareholders ever signed any articles of association, and even if articles made provision as to disposition of interest of deceased members, otherwise than it would pass by law of partnership, or of descent and distribution, it must appear that such member agreed thereto. According to articles, at end of five years from date of contract there was to be partition of lands and other property among members. (Rec. 148.) Contract expired more than thirty years ago.

But the will itself, whatever may be Hancock's authority in the premises, is ineffectual to pass title to property under laws of Texas. Said laws provide :

"Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator, or by some other person by his direction and in his presence, and shall, if not wholly by himself, be attested by two or more credible witnesses, above the age of fourteen years, subscribing their names thereto in the presence of the testator." (1 Pasc. art. 5361 ; Rev. Stat. art. 4859.)

It does not appear that Hancock's will was "*wholly written by himself,*" or that the same was attested by two or more credible witnesses above the age of fourteen years, who *subscribed* their names thereto "*in the presence of the testator.*" (Rec. 109.)

And further, the will, if otherwise valid, has never been probated in Texas.

The following provision is made, by laws of Texas, for admitting to probate and giving effect to foreign wills :

"When application is made for the probate of a will which has been probated according to the laws of any of the United States or territories, or of any country out of the limits of the United States, a copy of such will and the

probate thereof, attested by the clerk of the court in which such will was admitted to probate, and the seal of the court annexed, if there be a seal, together with a certificate from the judge or presiding magistrate of such court, that the said attestation is in due form, may be filed and recorded in the court, *and shall have the same force and effect as the original will*, if probated in said court; provided that the validity of said will may be contested in the same manner as the original might have been." (Rev. Stat. 1856. See Paschal v. Acklin, 27 Tex. 173.)

See also:

Kerr v. Moore, 9 Wheat. 565; Armstrong v. Lear, 12 Wheat. 169; Nornan v. Bradley, 9 Wall. 394; Brownson v. Wallace, 4 Blatchf. 465; Wilson's Executors v. Tiapan, 6 Ohio, 172.

Hancock does not devise property absolutely to Preston, but *on condition* or *trust* that he pay over *half* to Mary D. Hancock. Probate of will is required to enforce this trust. Leland v. Smith, Sup. Ct. Mass., January, 1882, 13 Reporter, 368. See also Bailey v. Bailey, 8 Ohio, 239; Ives v. Allyn, 12 Vt. 589; Campbell v. Shelden, 13 Pick. 8; Campbell v. Wallace, 10 Gray, and 1 Perry on Trusts (3d ed.), sec. 93. As to interest of Preston as devisee, if he has any, suffice it to say that suit is not brought by him in his *individual* capacity to protect or enforce this interest—nor is his interest anywhere stated or defined, nor does he ask the court to declare or define it. He sues as *chief agent* for *entire association*, and the decree responds to his demand.

But as a subscribing witness Preston is incompetent to take under the will. It is provided in Rev. Statutes of Texas, as follows:

"Should any person be a subscribing witness to a will, and be also a legatee or devisee therein, if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to so much of such share as shall not exceed the value of the bequest to him in the will." Rev. Statutes, Art. 4872.

Preston is not only a subscribing witness, but the *only subscribing witness on whose oath the will was proven* (Rec. 109), from which it is to be inferred the will could not be otherwise established. And it not appearing that Preston would have been entitled to any share of Hancock's estate if there had been no will, he takes nothing under the will.

VI.

The court below erred in not dismissing bill, because in effect a suit against the State of Texas.

Until this court shall decide that under no circumstances a case can arise which it will pronounce to be in violation of the eleventh amendment of the Constitution of the United States, *unless a State is by name* a party to the record, the question which we propose to discuss remains open.

That the court may perceive we are not attempting to overturn adjudications authoritatively settled upon principle, we may, as legal propositions, concede:

1. That, as held in *Osborne v. Bank of U. S., 9 Wheat. 738*, the Constitution of the United States has provided a tribunal which can protect those who are employed in carrying into execution the *laws of the Union* from the attempt of a particular State to *resist the execution of those laws*, and it may be said of any other State, as was said by Mr. Chief Justice Marshall, of Ohio, in that case, that "it was proper then to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be *repugnant to the Constitution or to a law of the United States made in pursuance thereof, so as to furnish no authority* to those who took or to those who received the money for which this suit was instituted."

2. That, as held in line of cases beginning with *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904, followed by *Bank of Ky. v. Wister*, 2 Pet. 318, and *Louisville R. R. Co. v. Letson*, 2 How. 497, the fact that a State is a stockholder in a corporation will not defeat a suit brought in Circuit Court of United States, for the reason that when a State becomes a partner or stockholder in a trading company, it strips itself, so far as the *business transactions of the company are concerned*, of its sovereign character, and takes, as to such transactions, the character of a private citizen—that the State, by becoming a corporator, does not identify itself with the corporation—that as a member of the corporation it does not exercise sovereignty, but exercises only such powers in the management of the affairs of the corporation as are expressly given by the incorporating act, and the judgment is to be satisfied out of property of corporation.

3. That, as held in *Davis v. Gray*, 16 Wall., 203, a circuit court

of the United States in a proper case may enjoin a State officer from executing a State law which impairs the obligations of a contract, and therefore conflicts with the Constitution of United States.

But we deny that a circuit court of the United States can enjoin a *State officer* from discharge of *official* duties required by a *State law where such law does not conflict with Constitution or laws of United States*, and thus under guise of suit *against the officer* interfere with *administration of State of Government*, or, except as above stated where State may be stockholder in corporation, adjudicate upon titles, rights and interests of State.

Eleventh amendment was ratified January 8, 1798. In following year *Fowler v. Lindsey*, 3 Dall., 411, was decided. The question was whether the case was one that ought to be removed by certiorari into this court as one over which it had original and exclusive jurisdiction, as if State were a party. Upon this point Mr. Justice Washington says: "That a case which belongs to the jurisdiction of the Supreme Court on account of the interest that a State has in the controversy must be a case in which a State is either nominally or SUBSTANTIALLY the party." He further says, referring to the States of New York and Connecticut, from which Fowler and Lindsey claimed conflicting grants: "Nor do I think that they can be regarded as SUBSTANTIALLY the parties to the suits; nay, it appears to me that they are not even interested or affected." In *United States v. Peters*, 5 Cranch., 115, Mr. Chief Justice Marshall, while holding that a State could not be made a defendant to a suit brought by an individual, adds: "But it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of different States WHERE A STATE IS NOT NECESSARILY A DEFENDANT." The opinion admits that the suit was not brought against the State or its Treasurer, but against the executrixes of Rittenhouse, who were in the possession of the proceeds. "If," says the learned Chief Justice, "these proceeds had been the *actual property of Pennsylvania, however wrongfully acquired*, the disclosure of that fact would have presented a case upon which it was unnecessary to give an opinion." And further, "If the suggestion in this case be examined, it is *perfectly clear that no title whatever* to the certificates in question was vested in the State of Pennsylvania." Since then, he says: "The State of Pennsylvania had neither *possession of nor right to the*

property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the Constitution which has been cited; and consequently the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

In Osborne v. Bank of United States (9 Wheat. 738), the fund which had been wrongfully seized from the Bank of the United States was kept *separate* and not mingled with the other funds belonging to the treasury of the State of Ohio. It was an attempt on the part of Ohio to impair, under *power of taxation*, one of the institutions of the general government—the United States Bank—notwithstanding it had been previously held in McCulloch v. Maryland (4 Wheat. 316), that such a tax was unconstitutional, and that state officers could not shield themselves from individual responsibility behind an unconstitutional state law.

In Board of Liquidation v. McComb, Mr. Justice Bradley, speaking for the court, says:

"The objections to proceedings against State officers by mandamus or injunction are: first, that it is, *in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done.* A State without its consent cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." Cites Osborne v. Bank of U. S., 9 Wheat. 859; Davis v. Gray, 16 Wall. 220.

The same learned justice held in *Branch v. Macon and Brunswick R. R. Co.*, 2 Woods, 385, where a State endorsed bonds of a railroad company upon express condition that endorsement should vest in State title to all property purchased with proceeds of bonds

and give State first lien on all property of company, and upon failure of company to pay interest or principal of bonds, Governor of State should take possession of its property and sell same for purpose of paying bonds, and default being made by railroad company in payment of interest, and Governor took possession of road and advertised same for sale—that at suit of holder of bonds of subsequent issue, which State had endorsed on same terms as first issue, but which endorsement legislature had declared not binding on State, that the Circuit Court of the United States would not restrain sale of road by Governor, nor take possession from State, nor appoint receiver therefor, and that relief asked in such a case could not be granted without adjudicating rights of State, which ought not to be done. We extract from opinion as follows:

"While it is true that in the cases of Osborne v. The United States Bank, 9 Wheat. 738, and Davis v. Gray, 16 Wall., 232, the Supreme Court of the United States sustained suits against State officers for the recovery or protection of property belonging to the complainants or their trustees, in which the State had no interest or right, and the pretensions of the agents, in behalf of the States, were unconstitutional and void, we think no case can be found in which any court has assumed jurisdiction to interfere with property in the possession of the State, and admitted to have come rightfully into its possession. In this case, the railroad in question is as much in possession of the State itself as is the State house or any other property belonging to it. And then the title, by which the complainants seek to have this court take possession of the property and wrest it out of the hands of the State, is one which admits the title of the State, and is, in truth, none other than that of the State itself, to which the complainants seek to be subrogated. The court is asked to make a decree, operating directly upon the rights of the State, and transferring them to the complainant and the other bondholders. It is not merely the possession of its agents, but the actual right and title of the State itself, which are sought to be affected and transferred. We think this cannot be done without making the State a party to the suit, which cannot be done. The State has provided a security for its own indemnity to be managed in its own way by its own officers and agents. Can such a security be taken out of its hands, at the instance of the creditors ultimately to be benefitted? Can the State be charged as trustee for

those creditors, and compelled to give up the trust fund, by a court which has no jurisdiction over it? It seems to us that the difficulties of the case are insurmountable. Again, the State evidently intends to question the validity of the bonds of the second issue, and if liable only to the first issue, is interested in having the indemnity fund applied to the satisfaction of that issue. To sustain the complainant's case, the court would be compelled to decide upon the State's liability and its guaranty of the second issue of bonds, without having it as a party before it, and, if satisfied of such liability, would have to decide to that effect, because the complainant and his co-bondholders have no claim against the railroad except through the equities arising from a valid guaranty of their bonds by the State. The court is called upon, therefore, to adjudicate directly upon the State's liability and the guaranty, without having any jurisdiction over it, as a party, and having decided in favor of that liability, it is then called upon to dispose of the fund which the State has taken for its indemnity. The case, therefore, involves a direct adjucation of the rights and liabilities of the State, and an ultimate execution of property in its possession, the State, at the same time, denying its liability and insisting upon its right to maintain its lawfully acquired possessions. It seems to us that this is asking the court to go further than any court has ever yet gone, except where legislation has been adopted, authorizing the State to be sued in the same manner as a private party."

In some of the cases it is intimated that there should be no objection to suit in Federal Court against State officers, when under law of State suit for same purpose could be brought against State.

By law of Texas it is provided:

"No court of this State shall have power, authority or jurisdiction to issue the writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this State, to order or compel the performance of any act or duty which, by the laws of this State, they, or either of them, are authorized to perform, whether such act or duty be judicial, ministerial or discretionary."

Act of February 15, 1881, General Laws, chap. 12, p. 7.

The above is but a statutory declaration of the law with respect to Land Commissioner as it was before passage of act. Galveston, B., etc., R. R. Co. v. Groos, 47 Texas, 428.

Sec. 1, of Art. V. of the Constitution of the State reads:

"The executive department of the State shall consist of a governor, who shall be the chief executive officer of the State, a lieutenant governor, secretary of State, comptroller of public accounts, treasurer, *commissioner of the general land office* and attorney-general. (Rev. Stats., p. 8)

Davis v. Gray unlike case at bar.

As this case was relied upon more than any other, as authorizing maintenance of this suit, we point out material differences between the two cases.

In Davis v. Gray, essential facts were that Memphis, El Paso and Pacific Railroad Company, incorporated by Texas, February 4, 1856, was entitled under charter, as construction of its road progressed, to certain *land certificates*, and to a land reservation on each side of road, on which to locate these certificates. Company organized, accepted and relied on grants, and especially on land reservations. All *conditions precedent* were complied with. It issued land grant bonds, and executed mortgages to trustees to secure same. Mortgages covered lands acquired or to be thereafter acquired by company, and *vested reservation in mortgages*. Bonds sold in Paris at par, purchasers being assured personally and by advertisement and prospectus of exclusive right of company to locate certificates with reserved territory. Bonds not being paid *at suit of trustee*, Circuit Court enjoined company from disposing of effects, and appointed Gray receiver, etc.

Constitution of 1869 contained following :

"All public lands heretofore reserved for benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

All lands granted to railway companies, which have not been alienated by said companies in conformity with terms of their charter respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the State for the benefit of the school fund."

By ordinance of convention which framed Constitution, heads of families actually settled on reservation, on payment of expenses of survey and patent, could obtain eighty acres, and vacant lands in reserve were authorized to be sold to heads of families and declared open to preemption settlers. Under authority of above, Commissioner of Land Office, and Davis as Governor, signed patents to locations made on certificates other than those issued to company.

Gray, citizen of New York, as receiver, etc., under order of court, brought suit in United States Circuit Court to restrain fur-

ther issue of patents, etc., on ground that *charter of company constituted a contract*, and that said *constitutional provisions and ordinance were void as impairing its obligation, etc.*

In Davis v. Gray, the conditions, the non-performance of which were discussed, were conditions *subsequent—conditions precedent*, as to surveys, etc., having all been performed. (See bottom page 205.)

In case at bar, conditions to be performed by Mercer and associates, such as introducing and settling emigrants, building houses, and, especially, surveying lands and making returns of surveys, etc., to Land Office, and furnishing proofs as required by law and contract, were *conditions precedent*, and their performance is circumstantially and specifically denied by answer, under oath sustained by proof. Mercer and associates *cannot put their finger on any single section or a foot of land upon which they ever put a settler or for which they ever asked a conveyance;* nor does decree identify any particular land to which they ever became entitled.

In Davis v. Gray, railroad company was to get *certificates* to be *located* on reservation.

In case at bar, Mercer and associates were to get, not certificates, but *deeds*, from the Republic, to *obtain certain pieces of land*, previously surveyed into sections of 640 or half-sections of 320 acres, and of which surveys had been returned to and were mapped in Land Office.

In Davis v. Gray, the time had *not expired* in which lands could be acquired. (See page 229.)

In case at bar, whatever rights Mercer and associates could acquire to lands in colony were to be acquired within five years from date of contract.

Contract expressly provides: "That any lands within the boundaries hereinafter described, *which shall not have been located by the emigrant families hereby authorized to be introduced and settled thereon, or appropriated under the provisions of this contract, within five years from the date thereof, revert to this Republic.*" (App., 10.)

Contract expired January 29, 1849, *more than a quarter of a century before original bill was filed.*

In Davis v. Gray, the jurisdiction of the court and its power to grant relief is vested on ground that provisions of Constitution of Texas and ordinance of convention were void, as impairing obliga-

tions of contract; that they were nullities; that acts enjoined were acts outside of and not in pursuance of law. The Supreme Court affirmed the decree of the Circuit Court, which reads:

"That in July, 1870, and at the time of the appointment of Gray as receiver, and at the date of the decree, the company was duly possessed of the franchise, and right of and to the land grant and land reservation of the company were unimpaired and in full force and virtue; that the provisions of the constitution of Texas, and of said ordinance of convention, so far as they impaired or purported to impair the said charter, land grant, or land reservation, were contrary to the provisions of article 1, section 10, of the Constitution of the United States, and were in so far null and void; and that the defendants should be perpetually enjoined from issuing, or causing or permitting to issue, any patents of the lands of the odd sections of said reservation except on the certificates granted to the company or its assigns."

In case at bar no particular law is assailed as impairing obligation of contract. It is true complainant prays that Constitution of August 27th, 1845, and all legislation in pursuance thereof, in so far as same may obstruct his rights "in and to the land grant or land reservation," or "rights to receive and locate certificates on said land, and to receive legal patents for the same, be adjudged and decreed by this honorable court to be contrary to the provisions of Article 1, Section 10, of the Constitution of the United States, and to be null and void" (Rec. 55–56), but he points out no such law. On the contrary, he charges:

"That from the time of the annexation of Texas to the Union up to the present time the Legislature of Texas has not provided a method for determining what lands may have been forfeited. He charges that no method has ever been provided by the constitutional convention of 1845 of the State of Texas or by its Legislature at any time to revoke the grant of Mercer or to repeal the same, or to resume the lands granted, or to re-attach the said lands to the public domain, or to authorize any officer so to do, or to re-enter on said lands or any part thereof in behalf of the State of Texas, or to enforce any forfeiture thereof, or to evict and oust Mercer and his associates therefrom, or disturb his or their peaceable possession of said lands." (Rec. 47.)

* * * * * *

"Your orator states and charges that *neither the Republic of Texas nor the State of Texas have ever by any constitutional or legislative act, or by any ordinance or resolution, or by any proclamation of any authorized officer, or by any legal proceedings of any authorized officer or court of competent jurisdiction, forfeited or attempted to forfeit the land grant made to Charles Fenton Mercer and his associates, nor has said grant ever been annulled or revoked by any act of the people or government of Texas.*" (Rec. 53-54.)

There is no reference to any law of the State of Texas impairing the obligation of the Mercer contract, in opinion of Mr. Justice Woods (App. 109) or Judge Pardee (App. 121.)

Mercer, in his report of December, 31, 1845, speaks of the ordinance of August 27, 1845, as having operated to promote emigration (Rec. 174), and says that it has "undoubtedly done much to appease the inquietude of contractors for colonization under repeated attacks upon their grants, and to impart security and confidence to the colonists themselves, that they will be permitted to hold and enjoy the lands promised to them, and surveyed for them by those contractors." (Rec. 176.)

The decree, as we have seen in the case of *Davis v. Gray*, specifically declared certain laws void, as impairing the obligation of contracts and enjoined issuance of patents to certain *odd sections* of land in reservation.

The decree in case at bar refers to no laws, nor does it identify any lands.

In *McCauley v. Kellogg*, 2 Wood's, 13, where it was held that the fact that holders of bonds issued by State could not sue State in court of United States, did not authorize court of equity, by decree, to compel state officer to levy and collect a tax for payment of bonds, and that a court of the United States would not compel, by injunction, officers of the State to execute laws of State. His honor Mr. Justice Woods, in delivering opinion, says:

"The dilemma is this: If the suit is against the defendants in their official character, and the claims made upon them are in their official character, the State may be considered a party to the record. Madrazo v. Governor of Georgia, 1 Peters, 110. If the suit is against the officers as individuals merely, and the offices they hold are given merely to describe their persons, they have no interest in the subject matter, and no decree should go against them. In the view I have taken of the case, I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to wit., a bill to compel the defendants, officers of the State, to execute its laws. This may be done in the case of the officers of municipal corporations, but the sovereign power of a state cannot be so coerced. To do so would be to substitute this court for the executive officers of the State, to supplant their views of duty and the obligations imposed upon them by their official oath. In other words, it would be an undertaking upon the part of this court to administer the State government. This the court has no power and no inclination to do. In my judgment, this is to all intents and purposes a suit against the State. The officers of the State, including the chief executive, are sued in their official capacity to compel

them to execute the laws of the State. It is a suit to enforce a contract of the State to pay money. The officers are not sued as individuals who happen to be in public office, to prevent them from doing some act to the prejudice of complainant not warranted by law, as was in the case in Osborne v. The Bank, and Davis v. Gray. If a suit like this can be sustained, then the 11th amendment to the constitution of the United States is waste paper."

The Arlington case, decided by this court at present term and not yetreported, was suit against officers of United States, and raised question as to whether such officers, when sued by private persons for property in their possession, could set up exemption of the United States from suit. There is no constitutional provision prohibiting suits by private individuals against United States, and whether suit be, in effect, suit against United States is determined, as in Arlington case, by general principles of law applicable to subject. Same question with respect to States is determined, not by *general principles*, as to suing sovereign in that court, etc., but by *positive inhibition in Eleventh Amendment of Constitution.* It is true court in illustrating views refer among others to case of Davis v. Gray, to effect that State must be party to record, etc., but Mr. Justice Miller, delivering the opinson immediately after his reference to this case, adds: "Though not prepared to say now that the court can proceed against the officer in all respects as if a State were a party, this may be taken as indicating, in a *general way*, views of court at that time." But true question in Arlington case, the one upon which the judgment is authoritative, is shown in following extracts from opinion:

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff—a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it s absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

* * * * * *

"Shall it be said, in the faceof all this, and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of government without any lawful authority, without any process of law, and without any compensation, because the President has ordered it, and his officers are in possession; If such be the law of this counrry, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated, liberty and the protection of personal rights."

If Arlington property had originally belonged to United States, as did lands in Mercer Colony to Texas—if United States had sold and patented portions of it to numerous citizens, retaining legal title in its own name to rest, would Circuit Court of United States have enjoined officers at head of Land Department of United States, who were not in possession of land and asserted no special control over or interest therein, in suit of private individual, to which *neither United States or purchasers under them were parties*, from furnishing any officer of United States or any purchaser living on Arlington property with copies of maps, etc., who claimed at some previous time to have made a contract with United States for settlement of property, etc., and this, too, in face of a positive constitutional inhibition against suing United States in said court? It would not; and yet this is what it must have done to make that case resemble case at bar.

If the Arlington case had been a suit in equity to enforce specific performance or trust against the United States, none of the officers of the United States being in possession, and the admitted title being either in the United States or her patentees, the cases might bear some analogy. In ejectment (as in the Arlington case), brought to recover the possession of lands from which the owner has been wrongfully ousted, and where it is necessary to make the person in possession a defendant, whether he be an officer of the United States or not, and where the landlord, or real owner (as did the United States), refuses to become a party, very different questions are presented from those which arise in the case at bar. The right of one deforced of the possession of that to which he already holds a clear title, and where he is seeking to regain possession, the possession being the object and fruit of the proceeding, may well rest, not upon the suability or non-suability of

the government, but upon constitutional guarantees which inhibit the *taking* of the property of the citizen without making just compensation or without due process of law; whereas the claim of one who was *never in possession*, and who is seeking for the first time to establish his title, depends not upon the constitutional guarantees just mentioned, but upon legal and equitable principles, to be applied by a court competent to take jurisdiction of the parties.

How else can a State be sued except through its officers? How else can a State act except through officers? It is said in Neal v. Delaware, 103 U. S. 370, quoting on page 370 from Ex parte Virginia, 100 U. S. 339: "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provisions (Fourteenth Amendment), therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws." On no other theory could the decision in that case have been sustained. Would it not be a curious result that an inhibition designed to *protect States* from suits should be so construed as to allow suits which are, in effect, suits against the State, to be brought against officers through whom alone State can act? If that which is prohibited directly can be accomplished *indirectly*, it is indeed true that "the letter killeth, but the spirit giveth life;" and the Eleventh Amendment, instead of reading as it does, should read:

"No suit shall be prosecuted against one of the United States by citizens of another State, but suits may be brought against State officers and the rights of the State affected, as though the State were a party, provided that as a punishment and disadvantage to the State for its exemption from suit by name, its officers, when sued, shall not be allowed to set up any defense in its behalf, inasmuch as the suit is against them and not against the State."

VII.

The court erred in not sustaining defendant's objections for want of parties.

Defendant suggested defect of parties in answer. Complainant did not set down objections for hearing, and court, on final hearing, refused to allow them. (Eq. Rule 52.)

State of Texas necessary party.—As said by Judge Pardee, in his opinion: "It has been vehemently alleged by complainants and adjudged by the court that the State is not a party to this suit." (App. 131.)

The learned Judge also remarks in same connection:

"The whole theory of this case is, that the contract with Mercer created an express trust, which by operation of law and compact devolved upon the State of Texas; that the State of Texas is now the trustee, the Texas Association the *cestui qui trust*; that the legal title is in the State, the equitable title in the Association." (App. 131.)

See opinion of Mr. Justice Woods to same effect (App. 118), and allegations of bill. (Rec. pp. 45, 46.) Defendant, in amended answer, after denying trust, etc., says:

"That if it be true that the State of Texas holds her public domain in trust for the benefit, in part, of said Mercer and associates, as in said bill alleged, which is denied, then this defendant insists and suggests that the complainant's bill is defective for the want of proper parties; for he says that the State of Texas, who holds the legal title to said lands, is not before the court, and that no relief can be granted herein without her presence, nor is this honorable court competent to make any decree against said State." (Rec. 73.)

And in original answer, after alleging that lands in colony not granted by state were portion of public domain, subject to location by holders of valid certificates, etc., it is said:

"That the said State of Texas is directly interested in the subject matter involved in this suit, and is a necessary party to this suit. Wherefore this defendant saith that this court cannot proceed further herein for the want of a proper and necessary party hereto, to wit, the said State of Texas." (Rec. 21.)

As to necessity of having party before court who is required to perform or who holds legal title, see Pomeroy on Spec. Per. sec. 483, et seq., and sec. 547; 1 Danl. Chy., 5 ed, 194-196; 2 Perry on Trusts, sec. 873, et seq.

In Bank v. Carrollton Railroad, 11 Wall. 624, it is said (p. 631):

"It is doubtless the general rule that a bill in chancery will not be dismissed for want of proper parties; but the rule is not universally true. It rests upon the supposition that the fault may be remedied and the necessary parties supplied. *When this* is impossible, and whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. Nothing is to be gained by retaining it when it is certain that the complainant can never be entitled to a decree in his favor."

Citing note 5, s. 541, Story's Eq. Pl.; Shields v. Barrow, 17 How. 130. See also Barney v. Baltimore City, 6 Wall. 280; Davenport v. Davis, 18 Wall. 626; Kendig v. Dean, 97 U S. 423.

The injunction granted by the court affects control of the State over lands not previously granted within the colony by preventing the State from dealing, through her officers, with her lands according to her own views of policy. The injunction, as has been shown, covers a large excess of lands in which complainant can have no possible interest.

Governor of State Necessary Party.—Complainant's chief object, as disclosed in his amended bill, was to compel defendant, as Commissioner of Land Office, to issue to him 1376 land certificates. Defendant sets up provisions of act of April 9, 1879, and insists that the Governor of the State is necessary party. (Rec. 31 and 32.) Sections 1 and 2 of this act are as follows:

SECTION. 1. *Be it enacted by the Legislature of the State of Texas*, That whenever any doubt may arise as to the propriety of the issuance of any certificate, or certificates, for lands by the Commissioner of the General Land Office; or whenever a suit may arise, in any court whatever, having for its objects to compel or restrain the issuance of such certificate, or certificates by said Commissioner, in all such cases before any such certificate, or certificates, shall issue, said Commissioner shall notify the Governor of the existence of such doubt or suit, and said Commissioner shall act in the premises as advised by the Governor.

SEC 2. When the Commissioner of the General Land Office shall have issued any certificate, or certificates, under the circumstances recited in section one of this act, such certificate, or certificates, shall be presented to the Governor for his approval and signature, and when the Governor has examined the same, and the circumstances under which they were issued, if he approves the issuance thereof, he shall countersign the same, and if he disapproves the issuance thereof, he may refuse to countersign the same, and when the Governor has failed or refused to approve and countersign said certificate, or certificates, no surveyor, either public or private, in this State, shall make a survey for the same, nor shall the same be recognized as a valid land certificate for any purpose whatever. (Acts 16 Legislature, p. 115.)

Defendant states he had notified the Governor of the pendency of the suit, and been advised by him not to issue certificates to Mercer and associates or those claiming by, through or under them. (Rec. 74.)

This law is assailed by complainant as the result of a conspiracy between the Governor and Walsh for purpose of embarrassing

complainant in assertion of his rights. His Honor Judge Pardee holds there was no proof to sustain any such charge. (App. 128.) Reference to the Journal of the House of Sixteenth Legislature of State (Part 1, p. 43), will show that this law was passed in pursuance of recommendation of Governor in his message, the occasion for such recommendation being the issuance of a large number of land certificates to a river improvement company, contrary to opinion of Attorney-General. The matter which gave rise to the law was wholly foreign to this case.

His Honor Judge Pardee, referring to this law, *very* properly observes:

> "I am not prepared to say that complainant, under the Mercer contract, acquired any vested right as to the forms and manner in which the title of the Republic was to pass or be conveyed. If he did, he is remitted to the laws in force at the time of the making of the contract.
>
> "An examination of the laws of the Republic in force at the making of the contract fails to show any authority for the Commissioner to issue land certificates. Many other officers and boards could issue them, but not the Commissioner.
>
> "The contract itself provides for no certificates to be issued by the Commissioner.
>
> "As I view the matter, therefore, under the laws of Texas, to operate the conveyance of title emanating from the State to public lands, either by patent or certificate, the act of the Governor of the State is necessary, and the Governor is no party to this suit." (App. 132.)

Members of Association Necessary Parties.—Defendant insisted that they were necessary parties. (Rec. 75.) Only excuse given by complainant is, "that the shareholders are numerous and, as far as he is informed, beyond the jurisdiction of this court, and that it would be impracticable to make them parties to the proceeding." (Rec. 5.) And yet in the way of exhibits and otherwise he furnishes no less than four lists of shareholders with places of residence, etc. (Rec. 86, 88, 167, 181.) Duval, complainant's witness, gives names of number of shareholders, and speaks of books belonging to association from which information could be obtained. (Rec. 233, 234.) Preston ought to know who his own co-partners are, *claiming as he does to be chief agent*, and having access to books and papers of concern. Defendant denies, as we have seen, that Preston has any right to represent these shareholders, especially the interest of such of them as are dead or who have not assented to such representation. If shareholders repudiate Preston's authority, is any decree made herein binding on them? The law is well settled that in suits by or against unincorporated associations

all the members must be made parties, as in case of ordinary partnership. (2 Lindley on Part., by Ewell, Ed. of 1881, p. 1084 citing, amongst other cases, Pipe vs. Bateman, 1 Iowa, 369; McCreary vs. Chandler, 58 Me., 537; Williams vs. Bank of Mich., 7 Wend., 542, per Walworth, Ch.; Niven vs. Spickerman, 12 John, 401; Bullard vs. Kinney, 10 Cal., 60.)

Settlers Necessary Parties.—If complainant had not asked and court had not granted an injunction affecting settlers, their presence as parties might be dispensed with. In one aspect of case he seems to assert no equity against settlers. Referring to alleged wrongful issuance of patents, etc., to them, he says:

"Great numbers of *innocent* persons, not conscious of the injury thereby done to your orator and the Texas Association, have been induced to pay money and render services for such certificates and patents, and to bestow labor and expend money for such certificates and patents, and to bestow labor and expend money upon the lands pretended to be conveyed to them, and said wrong has been pursued to so great an extent that the lands within the limits of Mercer's Colony now remaining and not claimed under such pretended certificates and patents are now and at this time wholly inadequate to satisfy the just demand and right of your orator and the Texas Association.

"Your orator says that he and his associates are very unwilling, by multitudinous actions, to disturb or evict those who hold such certificates and patents, and have so expended their labor and money on the faith of them, being deceived and misled by the wrongful acts of the defendant and his predecessors, and that very great hardship and suffering would result from so doing." (Rec. 47–48.)

As to the 1256 persons who obtained certificates from Crockett (Rec. 116, et seq.), he admits they hold patents. (Rec. 6.)

In his memorial to the Legislature of Texas, of January 29, 1873, Hancock, as chief agent of association, says: "The Legislative department, while securing protection and quiet to the colonists, failed to provide for the just claims of Mercer, who, after exhausting his means in colonizing the country, was compelled to wage an unequal contest for his lands with the settlers, or *abandon* his claim to lands within the limits of the colony. He chose the latter course, and quietly awaited the result of similar difficulties in Peters' colony before applying for relief." (Rec. 241.)

If matters had rested here, settlers would not be necessary parties, but an injunction is prayed for and granted, which, while it does not, and cannot, divest settlers of title, operates to their prejudice and annoyance. It is because of this defendant insisted they should be made parties. (Rec. 31, 75.)

The names of persons to whom Crockett issued certificates (Rec. 116), appear in exhibit to original bill, and defendant offered to furnish names of others so that complainant would have no difficulty on subject, but he seems to have preferred, without directly asserting, any equity against them, or to call their titles in question or litigate as to priority of right or claim, to reach them by an injunction without giving them the *opportunity of being heard.*

His Honor Judge Pardee, dismisses this branch of the subject by saying :

"It has been urged, and in fact charged, in the answer, that many innocent persons have acquired equitable titles to lands in the limits of the Mercer colony, and that to contine the injunction will operate a loss and hardship.

"No proof is made, but taking it to be true, there is no suggestion that any of these equitable titles are of a higher nature or of earlier date than complainant's titles. It shows the more forcibly the necessity for the action of the polltical department of the State, but shows no sufficient reason for this court to deny complainant the relief that equity and good conscience require." (App. 133).

Instead of *equitable titles*, as suggested by His Honor, the bill admits, as we have seen, that *patents* had issued to 1256 persons, the State thus divesting itself of the *legal title* and vesting it in the patentees. The bill admits, and the sworn answers of defendant (Rec. 31,75) aver, that settlers are in possession, and living upon lands. Whether the title of the patentees and other settlers is superior or inferior to complainant's, could only be determined in a suit between them. It is for complainant, if he would disturb those holding the *legal title*, and in *possession*, to show that they took with notice of his rights, and under such circumstances as to authorize a court of equity to set aside the legal title in favor of a superior equity, and this could only be done by having the parties in interest before the court.

If A agrees to allow B to settle, upon certain conditions, a certain tract of land, and thereupon to convey to B certain portions thereof, and A assuming that B has not performed the conditions of the contract so as to acquire any rights thereunder, conveys land to C, what would be thought of a suit by B, not against A, the other contracting party, nor against C, the subsequent purchaser, who *held legal* title and was in possession, but against the Register of Deeds of the county, as *sole defendant*, for the purpose of restraining such Register of Deeds from giving C copies of deeds, maps, etc.? A precedent for such a suit, we apprehend, cannot be

found. If A, having the right to call on B for a conveyance, stands by for twenty or thirty years and without objection allows B to convey to C, and C goes into possession, it would seem too clear for argument, that C has not only the legal title, but the superior equity.

Complainant is in this dilemma:—If the settlers are innocent persons, against whom he can assert no equity, he should not have asked and the court should not have granted an injunction to seriously embarrass them in the enjoyment of their rights.

If not innocent persons, and he claims, any relief against them by injunction, or otherwise, they are necessary parties. (Pomeroy on Specific Permance of Contracts, p. 546, note 1, sec. 493, and notes 3 and 4 thereto, Waterman on Specific Performance of Contracts, sec. 64 and note. 2 Perry on Trusts, 3 ed. sec. 877. Ribon v. Railroad companies, 16 Wall. 446. Noyes v. Hall, 97 U. S. 34.)

VIII.

The final decree as rendered, is not only contrary to law, but fails to define rights of complainant or duties of defendant, and must prove nugatory so far as real merits of controversy are concerned. Said decree is further erroneous in adjudging costs of suit against defendant Walsh.

The errors in overruling all the special defenses urged by defendant, and in finding, notwithstanding proofs to the contrary, that complainant's allegations were true, lead to the error of rendering a final decree subject to the fatal objections indicated in above assignment. It is well settled that to authorize decree, party asking relief must show performance or readiness to perform.

Boone v. Missouri Iron Company, 17 How., 340.
Washington v. Ogden, 1 Black, 450.
Marble company v. Ripley, 10 Wall., 339.

Must not be guilty of laches. Preston v. Preston, 95 U. S., 200; Holt v. Rogers, 8 Pet., 420.

In conditional contract conditions precedent must be performed before right accrues. (Pomeroy on Specific Performance of Contract, sec. 323, et seq.) Contract must be mutual, id. section 162, et seq. Performance must not be impracticable, id. sec. 303, et seq., and note 2, p 57.

It is said, "and if upon the case as made out by the bill, complainant is not entitled to a specific performance, he cannot have an injunction, which is merely auxillary to the principal object of the suit." (2 High on Injunction, 2d ed., sec. 1120, citing Allen v. Burke, 2 Md. Ch. 534. Poto v. Brighton R. Co., 1 Hems. and M., 468.)

It is also well settled that complainant must recover on case made by bill, and this notwithstanding prayer for general relief. (Hobson v. McArthur, 16 Pet.. 182, cited with approval in Hayward v. National Bank, 96, U. S., 611, p. 615.) And that while admissions in bill are to be taken as true in favor of defendant (1 Daniel's Chy. 5 ed., p. 839), admissions in answer cannot, under any circumstances, lay foundation for relief under any specific head of equity, unless they be substantially set forth in bill. (Jackson v. Ashton, 11 Pet., 229, p. 249; Bailey v. Ryder, 10 N. Y., 363, pp. 369, 370.)

Complainant not having waived answer under oath, as he might have done under amendment to 41st equity rule, defendant's answers responsive to allegations of bill are evidence, and to entitle complainant to relief he must be sustained by testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to testimony of another witness. (Vigel v. Hopp, 104 U. S., 441.)

The 39th equity rule which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves complainant under burden of proving his bill, and takes from him benefit of defendant's answer, but defendant may be examined as witness. (Mr. justice Bradley in Gaines v. Agnelly, 1 Woods's, 238.)

In Washington Railroad vs. Bradleys, 10 Wall, 229, it is said: "Averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them." (P., 303.)

The Decree in this case finds the allegations of bill to be true, though as to charges of conspiracy between the Governor and the defendant, and the violation by defendant of injunction, the learned judge states, in his opinion, that they are without foundation (App. 128). But we may suppose, in the absence of anything definite, that decree meant to find that Mercer and associates had introduced from abroad and actually settled 1256 families, the number mentioned in Crockett's report, had built homes for these families, had surveyed the exterior lines of the colony, had sub-divided colony into sections and half sections,

by proper surveys, had made returns of such surveys to land office, and had in all other particulars with respect to said 1256 families performed the conditions of their contract so as to entitle them to ask deeds for lands to extent of said 1256 families. This must be the finding of the court, otherwise decree has nothing to stand upon. Upon this view the court having very properly determined that it had no power at this late day to make a new contract so as to substitute *floating land certificates* for particular tracts and parcels of land, and constituting itself the Legislature of the State, pass a law authorizing the issuance of such certificates by the Commissioner, there remained but one course, nd that was to make such decree touching complainant's interest to *lands within the colony* as would be conformable to the principles and practice governing courts of equity.

And unless a court of equity, according to equitable rules and principles, would put all interests within the colony upon the same footing, it is evident that decree should have distinguished between them.

Decree Covers Entire Colony.—After perpetuating the injunction *pendente lite*, which extends to the whole colony (Rec., 24, 25), decree, except as to University lands, perpetually enjoins:

"The defendant, W. C. Walsh, Commissioner of General Land Office of the State of Texas, and all and every his successors in office, and all his clerks, draftsmen, subordinates, agents, servants and employees, and all officers or agents subordinates to him, the said defendant, or to any of his successors in office, or in any manner under the directions, supervision, or control of him, or of any of his successors in office, be and hereby is and are restrained, prohibited and forever enjoined from issuing or delivering, or permitting to be issued or delivered, *to any person or persons, or to any corporation, any certificate or certificates, patent or patents, plat or plats, for any land or lands within the boundaries of Mercer's colony, as set forth in the bill of complaint and the exhibits therewith filed;* and from any and all interference with, or infringement of, or upon, the land grant or *land reservation known as Mercer's colony;* and from doing, or causing to be done, any act or thing whereby there may issue any patent, certificate, plat or grant of any land *within the boundaries of said Mercer's colony, as defined and set forth in the bill of complaint, and the exhibits filed and as set forth in the contract made on the twenty-ninth of January,* 1844, by and between the Republic of Texas, by Sam Houston, President thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas; *except to the complainant, William Preston,* as chief agent of the Texas Association, or his suc-

cessors or assigns, or to such person or persons as he or his successors may in writing direct."

It further enjoins him

"From hindering, obstructing, preventing or delaying the said William Preston, his agents, attorneys, employees, or the successor or assigns of said Preston and their agents, attorneys or employees, in the surveying, selecting, platting, recording, entering or claiming any and *all lands lying within the limits and boundaries of the so-called Mercer colony, as set forth in the bill of complaint and the exhibits therewith filed;* and the said defendant and his successor in office, and his and their agents and subordinates, are enjoined from hindering, obstructing, preventing or delaying the said Preston, or his successor or assigns, or the Texas Land Association, from performing and completing and perfecting all and singular the several conditions, duties, obligations and acts devolving upon the said Preston or said association, under the terms and stipulations of the colonization contract set forth in the bill of complaint in this cause, and in the exhibits filed with the said bill of complaint." Rec. 335; statement, p 32 ante.

Mercer colony, "as set forth in bill of complaint and exhibits therewith filed," contains, approximately, 6098 square miles, or about 4,000,000 acres of land. It lies in the heart of the richest portion of the State, and has a population of over 130,000. To the people of this and other sections of the State, the General Land Office of Texas, as the source from which titles emenate, and as the primary repository of archives, records, maps, etc., occupies the same important relation as does the General Land Office of the United States to the people of the States and Territories carved out of the public domain of the general government. Applications are of necessity hourly made to it for records to establish rights, adjust boundaries, etc. And yet, the doors of this office are closed, not only to the citizens of Mercer colony, but to every other citizen of the State, as well as to non-residents having landed interests therein, and no one is allowed to enter these doors to preserve or defend rights, "*except the complainant, William Preston, as chief agent of the Texas Association, or his successors or assigns,*" etc. Not even a county surveyor, who may require official maps, etc., to adjust boundaries of counties, or of lands devoted to public uses, can enter these doors closed to all others except *William Preston.* If it be said that the decree does not extend to the whole colony, we ask to what does it extend? We have shown that there is an excess of several millions of acres, which, under terms of contract, reverted to Republic or State. No line is drawn between that portion to which the

claim of Mercer and associates attaches, and this excess, which is about seven times greater than such portion could possibly be. Whether we consider this suit as a suit to establish and enforce a trust, or in the nature of a suit for specific performance, there must be an identification of that to which the right attaches, and to which the decree of the court must relate. The subject which invokes the protection of the trust, *is the contract*, and the *rights of the parties must, in any view, be measured by the contract.*

Vagueness and uncertainty of decree and its prejudicial effect on parties and interests not represented before the court.—That the effect of the decree as rendered may be fully perceived, it is important to note the several portions of the colony and different interests therein, upon which it operates. They may be thus classified:

1. Lands within colony to which rights had accrued before Mercer contract was made.

2. The particular sections and half sections of land within colony to which Mercer and associates may at one time have had claim, but to which State has parted with legal title by patenting to others.

3. The particular sections and half sections of land within colony to which Mercer and associates may have claim and which are still vacant.

4. The excess of land within colony to which Mercer and associates never acquired any special claim.

As to the first, viz: *Lands within colony to which rights had accrued before Mercer's contract was made.* These were expressly excepted by law (statement 4) and by contract (id, 6). Without resort to the most strained implication, the decree as rendered prevents persons who had made valid locations prior to January 29, 1844, from now obtaining patents, etc., from land office. Such persons are not parties, and there is no reservation as to their rights.

As to the second.—*The particular sections and half sections of lands within colony, to which Mercer and associates may, at one time, have had claim, but to which State has parted with legal title by patenting to others.* The decree does not identify them, nor is it aided by pleadings and proofs, for they are no where described or identified therein. If intended to limit decree to these, the parties are in the same position as if no decree had been rendered. Neither of them can tell where the lands are nor to what the injunction applies. The decree does not attempt to vest title in complainant

or any one else, or put complainant or any one else in possession of any particular portion of the colony or tract of land.

An injunction should be specific. It should show the party the limits of his authority, and not leave him to find out what is forbidden and what is allowed. Kerr on Injunctions, 2nd ed., sec. 559, note a. Whipple v. Hutchinson, 4 Blatch. 190, per Mr. Justice Nelson. "This writ," it is said in this case, "as a general rule ought to contain a *concise description of the particular acts or things* in respect to which the party is enjoined, so that there may be no misapprehension on the subject." The injunction should be so specific as to render it unnecessary to resort to plaintiff's bill to ascertain what it means. (Sullivan v. Judah, 4 Paige, 444; Moat v. Holbien, 2 Edw. Chy., 188; Richards v. West, 2 Green. Chy., 456.)

It should not be broader than necessary. Marble Company v. Ripley, 10 Wall. 339; German Printing and Publishing Co. v. Illinois Staats Zeitung, 55 Ill., 127; Laurie v. Laurie, 9 Paige, 234.

The true rule is stated by the Supreme Court of Kentucky in Honore v. Colmesnil, 1 J. J. Marsh, 508. A decree should be dfinite and certain, and should of itself exhibit the extent of the recovery and the amount, and should justify execution without reference to the pleadings or to anything extrinsic. And in one of the earliest cases in that court, (Kenedy v. Duncan, Hardin, 365) it was held that a decree purporting to be for 600 acres of land, to which quantity, and no more, the complainant was equitably entitled, but in which it was appearent, by calculation from the courses and distances given for the boundary, that more than that quantity was decreed to be conveyed, was erroneous, the court saying, among other things: "The decree is for an entire undivided thing, and we cannot discover how this court can make a severance. It being a chancery cause does not lessen the difficulty, or alter the case. It is one of the cases where chancery must follow the law."

See also Elliott v. Waring, 5 Mon., (Ky.) 338, and McManus v. Stevens, 10 La. An., 177.

We have so fully argued the necessity of proof on this subject, and the want of it as fatal to complainant's case, that further discussion is unnecessary. But if the decree identified the land, the patentees holding the legal title and in possesession are indispensible parties. This point also has been fully argued. This objection applies to the 1256 persons mentioned in Crock-

ett's report, to whom the State issued patents. Neither the defendant, as Commissioner of the Land Office, or the Governor of the State, if the Governor were a party, have power to recall patents issued under authority of law, as under act of Feby. 2, 1850, nor has any court of the State, or the circuit court of the United States, power to annul or declare such patent void, without having patentees before the court. An injunction should not, therefore, have been granted affecting the rights of these patentees without giving them a hearing, in view of the fact that Mercer and associates stood by for years without protest or objection, and saw the State issue the patents, and especially as they have solemnly declared to the world that they had abandoned claims against settlers and to lands within colonies. Where right is barred, injunction will not be granted against persons claimiming adverse rights. Gifford v. Holmes, 98 U. S., 248.

As to the third—*The particular sections and half sections of land within colony* to which Mercer and associates may *have claim, and which are still vacant.* These are not identified by decree, nor by pleadings and proof. If they were, the State holds the legal title, and title cannot be divested without having her before the court. No patent can be issued without the signature of the Governor, and he is not a party. These objections for want of parties have been fully discussed. (See Marquez v. Frisbie, 101 U. S. 473.)

As to the fourth.—*The excess of land within colony to which Mercer and associates never acquired any special claim.* These, according to contract and law, reverted to Republic and State. Decree does not separate the reverted portion from the rest of the colony, but applies to all alike. The larger part of the 130,000 citizens of the colony may reside on this reverted portion. The State, who owns such of it as is vacant, and the citizens therein, who own the rest are neither made parties. Concede there were a trust as to the whole colony, the rights under the trust, as before observed, must be measured by the contract, and under contract Mercer and associates could have no possible interest in the excess. It was error, therefore, to grant an injunction to affect prejudicially the rights and interests of those not before the court, and in lands to which complainant can assert no equity.

With this injunction perpetuated a settler, if sued by Preston, would be wholly dependent on Preston's *favor* and *grace* to obtain from land office copies of papers, etc., to make his defense. It is no answer to this position to say that the decree does not conclude set-

tlers title. True, but it does bind the Commissioner, and prohibits him from issuing copies, etc., to any one having claim to lands within the colony.

An injunction may not restrain a man from building a house to shelter his family, but if it enjoins those who have the materials of which the house must be constructed from letting him have them, the same end is accomplished.

If the inhibition of the fourteenth amendment, as to State law and State courts, protects a man against a personal judgment, obtained without service of process (Pennoyer v. Neff, 95 U. S. 714), why does not the inhibition of the fifth amendment against depriving any one of life, liberty or property, without *due process of law*, protect a man against an injunction, issued by the Federal courts, which deprives him of the enjoyment of his property, without a hearing?

A constitutional provision, designed for the protection and security of the rights of the individual, is not to be perverted by a narrow construction. (Pumpelly v. Green Bay Company, 13 Wall. 166.) "A sentence of a court pronounced against a party, without hearing him *or giving him an opportunity to be heard*, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." (Windsor v. McVeigh, 93 U. S. 274, p. 277.)

Decree as Rendered is Impracticable and Nugatory as to Real Interests Involved.—Courts refuse to make decrees which it is impracticable to enforce (Pomeroy on Specific Performance of Contracts, secs. 45, 292, 303), or to issue injunctions in such cases (2 High on Injunctions, secs. 1109, 1120, 1121, 1122, 1162). We can scarcely believe it was the object of the decree, notwithstanding its language—that the defendant be "enjoined, restrained and prohibited from hindering, obstructing, preventing or delaying the said William Preston, his agents, attorneys, employes," etc., "in the *surveying, selecting, platting, recording, entering* or claiming any and all lands lying within the limits and boundaries of the so-called Mercer Colony," etc., or "from *performing and completing and perfecting, all and singular, the several conditions, duties, obligations and acts* devolving upon the said Preston or said association under the terms and stipulations of the colonization contract set forth in the bill of complaint in this cause and in the exhibits filed with the said bill of complaints"—to sanction the

right of Preston, to be supported by the authority of the court *to go into the colony nearly forty years after the contract was made and more than thirty years after it expired*, to colonize the towns, cities, railroads, colleges, schools, churches, homes, farms and orchards, not even excepting the cemeteries where lie buried the children of those who have grown to manhood and womanhood since contract expired and before this suit was brought. We repeat that we cannot believe such was the object of the decree, and yet, without some such object, what does the injunction granted accomplish? What is there now to be surveyed and platted, and what "conditions, duties, obligations," etc., of Mercer and associates can now be performed? The bill alleges and the decree finds that all this has been done. Court has no power to extend time of performance and none is asked. It must be apparent that the decree, as far as the real merits of the controversy are concerned, settles no rights. It does this, however—it operates to obstruct the administration of the land department of the State of Texas, and while it settles, and concludes no rights not represented, it affects prejudicially such rights by *controlling that officer*, and thus indirectly accomplishes much to the injury of large public and private interests. The State and the citizens of the colony not being parties, cannot appeal or supercede the decree, and the only way to avert the injuries which must flow from its *perpetuation* is by appeal to and reversal by this court. If it be said that the decree should stand "*until the conscience of the political department be moved*," we respectfully suggest that the judicial and political departments of our governments, both Federal and State, are designed in the wisdom of those who framed them to be kept separate, and the view that the one may coerce or control the independent action of the other found no favor, in Mississippi vs. Johnson, 4 Wall., 475, and in Georgia vs. Stanton, 6 Wall., 50.

Costs should not have been adjudged against defendant Walsh.—If plaintiff succeeds as to part of claim and fails as to rest, costs of part as to which he failed should be taxed and set off as against part to which he succeeded, and where costs have been increased by statement of claim which is untrue, plaintiff should pay increased costs, though case be substantially established. (Kerr on Injunctions, 2 ed., sec. 50, and authorities cited in notes u and x.) Courts of equity, in exercising their discretion on the subject, do "not consider the costs as *a penalty or punishment*, but merely as

a necessary consequence of a party having created a litigation in which he has failed." (2 Danl. Chy., 5 ed., sec. 1377.)

When specific performance of a contract by ancestor is decreed against heir to whom nothing has come by descent except property in question, costs should be charged against plaintiff in suit, for performance. (2 Danl. Chy. 5 ed., sec. 1383, note 6.) The reason for favoring the heir in such cases is, that the law casts the descent upon him and he cannot renounce. Why should not the like favor be shown an officer upon whom the law casts duties which he can not renounce? Walsh did disclaim, and would gladly have ridden himself of the vexation and expense of suit. (Rec. 25.) Even if the parties stood equally fair in every respect, the party who brought the other into court, and who is the cause of the litigation, ought to bear the expense. (Catlin v. Harned, 3 John Chy. 61.) Walsh had authority to issue neither certificates or patents to Preston. And in issuing patents, and furnishing copies of records, etc., to parties within the colony, he was only doing that which, if not his positive duty under the law, Mercer and associates had stood by and allowed to be done by his predecessors for more than a quarter of a century. Costs are not generally imposed on public officers where they appear to have acted in good faith. (Scrafford v. Gladwin county supervisors, 42 Mich., 464.) And the policy of the law should be, not to compel an officer to abandon duty and let suits against him go by default, for fear of being sold out under executions for costs, but to discharge in good faith the obligation which rests upon him, of making every fair and proper defense of official action. Those who place him in position expect this of him and the court should commend him for it.

If this were suit to administer a trust, on general principles, trust estate should bear expense. (Trustees v. Greenough, 105 U. S., 527.) And Walsh, if trustee, holding Mercer colony in trust, would be entitled to costs out of trust estate or from Preston as cestui que trust personally. (2 Perry on Trusts, 3 ed., sec. 894.)

Walsh states in his answer, and it is apparent upon the record that he has no personal interest in the matters in controversy in this suit. He is simply an officer of the State and has no knowledge, save what the records in his office disclose, and no purpose, save to discharge his duties as a sworn and bonded officer under the law. He was not even made a party to the suit until four pears after it was brought. He had nothing to do with, and is no wise re-

sponsible for the grievances complained of, before April, 1879. Where a proceeding abates on death of a party, each party is liable for his respective costs. (Harvey v. Harvey, 87 Ill., 54.)

Complainant puts his finger on no law which Walsh has obeyed, or refused to obey, to the prejudice of his rights. The gravamen of his complaint against him as set forth in the written demand made upon Walsh, is, that Walsh refused to issue certificates, for 1376 sections of land, which Preston could convert into money or locate anywhere on the public domain of the State outside of the colony. Article 3893, Revised Statutes of Texas, reads: "The Commissioner of the General Land Office is hereby authorized to issue to all persons and corporations such land certificates as they may be entitled to under any *general or special law*." There is no general or special law authorizing the Commissioner to issue certificates to any one claiming to represent Mercer colony, and as the public lands *belong to the State*, and not to Walsh, he is as powerless to dispose of them, without the State's authority, as Preston himself. It is no part of his duty to discharge the supposed obligations of the State by issuing land certificates. His authority is derived, not from contracts, but from general or special laws. And the court, where the contract is to convey *specific tracts and parcels of land*, could, with the same propriety, compel the issuance of *bank or mining stock* in lieu thereof, as to compel the issuance of certificates in this case. If such an order were made it would be not in specific performance, but in the way of *compensation*. When specific performance is impracticable, courts of equity, where they have the contracting parties before them, sometimes decree a money compensation, but they never undertake to discharge the obligation in other property, whether of lands or anything else, selected at the pleasure of the plaintiff.

Walsh has been charged, it is true, with conspiring with the Governor to embarrass complainant in assertion of his claim and with violating the injunction of the court, but of these charges he is completely exonorated in his honor's opinion. (App., 128.) One of complainant's witnesses (Spence), who was sent to the Land Office to examine into Walsh's conduct and to inspect the records of his office, says: "Commissioner Walsh did not object to my examining any of the maps or records relating to Mercer's colony, but was perfectly willing for me to examine them, and gave me ready access to any map or paper that I wished to see. No fee was asked and none demanded." (Rec. 260.)

Visiting upon Walsh, personally, the entire costs, emphasizes the objection that this is in effect a suit against the State. Walsh has been unable to supersede the decree. Its prejudicial effect upon the interests of the State, who is not a party, continues until its reversal by this court. To sue officers who may be powerless to protect the interests of the State render a decree which affects the interests of the State as though the State were a party, and compel the officers, individually, to pay the costs, makes the eleventh amendment, so far as the interests of the State are concerned, a snare and delusion, and, as to the officers, the means of working the greatest injustice.

If this objection be not sufficiently material of itself to work a reversal, this court can still make such order in the premises as it may deem just.

Concluding Observations.—This being an appeal in equity, which brings up for review all the matters which were decided in the court below to the prejudice of appellant (Buckingham v. McLean, 13 How., 150), counsel for appellant, in view of the large and important public and private interests involved, feeling the deep responsibility resting upon him, may have extended his brief to too great length. For this he craves the indulgence of the court. Complainant read in evidence, a letter written by an attorney of Mercer and associates, from Austin, Texas, in 1854, in which, after referring to the defeat of a measure for their relief in the Legislature of the State, it is said:

"At our advice and others of his friends here, Mr. Hancock immediately announced his intention of bringing suit in the United States District Court against the colonists. This suit we shall bring in a short time. Its effect will certainly be to alarm the colonists greatly, and with good reason they will be clamorous for the Legislature to settle the claims of General Mercer and his associciates and thus relieve them and their lands from the dangers of a lawsuit in a court of the United States—a tribunal of which the people of this country have a great dread." (Rec. 114.)

If such *dread* existed at that time, the causes therefor we know not. It is unfortunate that it should be so. As said by Mr. Justice Bradley, speaking for the court in Claflin vs. Houseman, 93 U. S, 130: "The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded or erroneous views of the nature and relations of the State and Federal governments.

It is often the cause or the consequence of an unjustifiable jealousy of the United States government which has been the occasion of disastrous evils to the country." That anything in this case has exhibited such feeling or the slightest dread or distrust of the court or learned judge trying this case below, we deny. And so far as this honorable court is concerned, we approach it not as *strangers*, but fearlessly, and with confidence as citizens of the United States and of the State of Texas, feeling that in matters of which it may take cognizance, it is as much *our court* as any court of Texas.

We have declined to anticipate charges against the good faith of the State in not settling with Mercer and associates. It will be time enough to answer such if they be made when those who claim under the Mercer contract—a contract made just the day before the law was to take effect, which condemned its execution and in defiance of the expressed will of the people, through their representatives—have shown that they have performed its conditions, and when the State has been made a party. No page in the history of Texas is blotted with repudiation of any debt or obligation. And if it be true, as stated in the original bill, that there were thirteen colonial contracts, and the State has adjusted claims of all other contractors, except Mercer, it would seem, in view of its repeated presentation to and examination by the Legislature, if it had possessed merit, the Legislature having dealt justly in twelve instances would hardly have stopped at the thirteenth.

"A court of justice," it is said, in United States vs. Union Pacific R. R. Co., (98 U. S. 569) "is called on not to enquire into the balance of benefits and favors on each side of this controversy *but into the rights of the parties as established by law, as recognized by the settled principles of equity and to decide accordingly*," (p. 620). With respect to our controversy, we ask the application of this just rule and nothing more.

Respectfully submitted,

A. J. PEELER,
Counsel for Walsh, Appellant.

109-297

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MAR 9 1883
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

WILLIAM C. WALSH,
Commissioner of the General Land Office of the State of Texas.
APPELLANT,

No. 863.] *vs.*

WILLIAM PRESTON,
APPELLEE.

Appeal from Circuit Court of the United States for the Western District of Texas. In Equity.

APPENDIX TO BRIEF OF A. J. PEELER, COUNSEL FOR APPELLANT.

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APPENDIX.

No. 1.

ACT OF JANUARY (FEBRUARY) 4, 1841.

Hartley, p. 624.

An Act granting Land to Emigrants.

ART. 2005. [1] *Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled*, That every head of a family who has emigrated to this Republic since the first of January, one thousand eight hundred and forty, or who may emigrate before the first of January, one thousand eight hundred and forty-two, with his family, and who is a free white person, shall be entitled to six hundred and forty acres of land: *Provided*, He settle and actually reside on the same for the term of three years, and cultivate an amount of the same not less than ten acres: *And further provided*, He shall have his land surveyed and plainly marked, so as to include his improvements.

ART. 2006. [2] *Be it further enacted*, That each single man over the age of seventeen, who has or may emigrate as provided in the first section of this act, shall be entitled to three hundred and twenty acres of land, upon the same conditions and restrictions as the heads of families.

ART. 2007. [3] *Be it further enacted*, That in no instance shall a patent be issued under the provisions of this act, unless the party produce the official certificate of the Chief Justice of the county where he may reside, that he, the said applicant, has proven by two respectable and creditable witnesses, that he has resided on the land for which he wishes to receive a patent, and that he has cultivated the quantum of land required by this act for the term of three years, and that he has done and performed all the duties required of other citizens, and that he has taken the oath of allegiance to this Republic: *Provided, always*, The applicant shall be required to make oath or affirmation that he has complied with the requisitions of this act; which oath or affirmation shall be properly authenticated.

ART. 2008. [4] *Be it further enacted*, That the President of the Republic be, and he is hereby, authorized to make a contract with W. S. Peters, Daniel S. Carroll, Alexander M'Red, Rowland Gibson, Robert Espie, William H. Oldmixon, Daniel Spillman, Robert Hume, John Salmon, W. Byrne, Henry Richards, Robert D. Stringer, W. C. Pe-

ters, John C. Bansamen, John Peters, William Scott, Phineas J. Johnson, H. S. Peters, Timothy Cray, and Samuel Browning, collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the Republic, on the following conditions, to-wit: The said contractors, on their part, agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract: *Provided, however,* They shall commence the settlement within one year from the date of said contract.

ART. 2009. [5] *Be it further enacted,* That the said contract shall be drawn up by the Secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution; which contract shall be signed by the President and the party or parties, and attested by the Secretary of State, who will also preserve a copy in his department.

ART. 2010. [6] *Be it further enacted,* That the President shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside: *Provided, however,* That all legal grants and surveys that may have been located within the boundaries so designated previously to the date of said contract, shall be respected; and any locations or surveys made by the contractors or their emigrants on such grants and surveys, shall be null and void.

ART. 2011. [7] *Be it further enacted,* That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family comprehended in said contract; nor more than three hundred and twenty acres to a single man over the age of seventeen years.

ART. 2012. [8] *Be it further enacted,* That no individual contract made between any contractor and the families or single persons which he may introduce, for a portion of the land to which respectively they may be entitled, by way of recompense for passage, expense of transportation, removal or otherwise, shall be binding, if such contract embrace more than one-half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land; nor shall any emigrant be entitled to any land, or receive a title for such land, until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation, and under good fence, at least fifteen acres on the tract which he may have received.

ART. 2013. [9] *Be it further enacted,* That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them: *Provided, however,* That this provision shall not release the colonist from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done, without a sale of their land: *And further,* The President may donate to every settlement of one hundred families made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

ART. 2014. [10] *Be it further enacted*, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families; and in the same ratio of half sections for every hundred single men introduced and settled; it being understood that no fractional number less than one hundred will be allowed any premium.

ART. 2015. [11] *Be it further enacted*, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; *and further*, all fees incidental to the issue of patents for lands acquired under the provisions of this law, shall be paid to the Commissioner of the General Land Office, for the use and benefit of the public treasury.

ART. 2016. [12] *Be it further enacted*, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce; who shall be entitled to their respective quotas of land, agreeable to the provisions of this law.

ART. 2017. [13] *Be it further enacted*, That the contractors shall be required to have one-third of the whole number of the families and single persons for which they contract, within the limits of the Republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same; and it shall be the duty of the Secretary of State forthwith, after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture; unless the president, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them, for the number of families which they are bound to introduce. And this act shall take effect from and after its passage.

No. 2.

SUPPLEMENTARY ACT OF FEBRUARY 5, 1842.

Hartley, p. 645.

An Act amendatory of "An Act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one.

ART. 2087. [1] *Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled*, That the provisions of an act entitled "An act granting land to emigrants," approved January fourth, one thousand eight hundred and forty-one, so far as relates to the authority thereby given to the President to enter into a contract with W. S. Peters and others to introduce colonists upon certain terms therein expressed and set forth, be and the same are hereby ex-

tended to such other company, or companies, which may be organized for like purposes, as the President may in his judgment approve.

ART. 2088. [2] *Be it further enacted*, That all the rights accruing to said company by the provisions of said act, and all the duties, obligations, and conditions imposed by the same upon the said W. S. Peters and his associates, be and the same are hereby extended to such other companies as may be organized under the provisions of this act.

No. 3.

ACT OF JANUARY 16, 1843.

Hartley, p. 649.

Joint Resolution to modify the provisions of an Act entitled "An Act granting Land to Emigrants."

ART. 2103. Whereas, by an act passed by the Congress of Texas, entitled, "An Act granting land to emigrants," and bearing date the fourth day of February, 1841, a grant was made to Daniel Joseph Carroll, Henry J. Peters and others, their associates, therein named, for the introduction and settlement of emigrants within the territory of this Republic, and upon the terms and conditions therein provided; and whereas, by said act, the President of this Republic was authorized to make a contract with said Daniel J. Carroll, Henry J. Peters, and their associates aforesaid, collectively, in conformity with the provisions of the same; and whereas, in pursuance of such authority, the President did make a contract with the aforesaid grantees, which was duly executed in their behalf, by their attorney, Samuel Browning, and which bears date the thirtieth day of August, 1841; and whereas, the President did make a further contract with the same parties, which bears date the twentieth day of November, 1841; and whereas, the President did make a yet further contract with the same parties, through their attorney, Horace Burnham, which bears date the twenty-sixth day of July, 1842, said last two contracts being supplementary to and making one with the said first contract; and whereas, it is deemed expedient to modify some of the provisions of said act and contracts, and to extend some of the privileges therein granted; now, therefore,

Resolved by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the President be, and he is hereby authorized and required to make such modification of the aforesaid contracts, or such further contract or contracts, with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of this Republic, and as shall not be inconsistent with the provisions of the said act:

Provided, however, That he shall have full power and authority to extend the time to the grantees named in the aforesaid act, or to their assigns or legal representatives, for the introduction and settlement of emigrants in this Republic, to a period not exceeding five years from

the first day of July next; and that he shall be authorized to prescribe the limits within which the grantees or their assigns or legal representatives shall be permitted to introduce and settle any number of families, not exceeding ten thousand, within the whole time limited; that he shall be authorized to make the title and conveyance of each section of six hundred and forty acres of land which has been or shall be acquired under any contract made or to be made, by the President of this Republic, with the grantees or their assigns, or legal representatives, to the said grantees or their assigns, or legal representatives, direct: *Provided*, That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid; and shall be required to settle or receive such lots only as are of fair quality for agricultural purposes, and not too far situated in the interior of a prairie for such purposes; and whenever they shall have completed the surveys of any number of sections, and built a corresponding number of small comfortable houses, or cabins of logs or other materials, thereon, and placed families therein, they shall receive a title from this government to one section of six hundred and forty acres for each family so introduced and settled; and shall be required to immediately convey to the legal representative of said family, not less than one hundred and sixty, nor more than six hundred and forty acres of said land; conditioned that said family shall remain upon said land so conveyed, and enclose with fence and cultivate fifteen acres, for at least three years; and in default thereof, shall forfeit the same to this Republic:

Provided, further, That in the contract to be made by the President of this Republic with the said grantees, or with their assigns, or legal representatives, they shall be required to settle each year, within the territory prescribed, or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed; and in default of introducing and settling such number of families, their contract shall be forfeited:

Provided, however, That they shall be allowed to introduce and settle any number of families, not exceeding ten thousand in all, on the same terms and conditions; and,

Provided, further, That they shall be permitted to settle all the sections within any limits prescribed, or to be prescribed, and not located previous to the time of defining such limits; and that for every alternate section of six hundred and forty acres which shall be conveyed to them, they shall pay into the treasury of this Republic twelve dollars in specie, on receiving the title from the government; and,

Provided, further, That in case of forfeiture, the party shall only be affected prospectively, anything in the aforesaid act, or contracts, to the contrary notwithstanding:

Provided, further, That the Cherokee lands shall be exempt from the provisions of this act.

No. 4.

CONTRACT WITH MERCER.

Contract of Colonization of Charles F. Mercer et al. with the President of Texas, January 29, 1844.

[The original contract is not sectionized, but, for greater convenience of reference, this is put into paragraphs, as numbered below.]

I.

This contract, made the twenty-ninth day of January, one thousand eight hundred and forty-four, between Sam Houston, President of the Republic of Texas, acting in behalf of the Republic, of the first part, and Charles Fenton Mercer, late of the State of Virginia, but now of the city of Tallahassee, in the territory of Florida, in the United States of America, and such associates as he shall choose, of the second part, witnesseth: That whereas, by an act passed by the Congress of Texas, entitled "An act granting land to emigrants," approved February 4, 1841, the President of the Republic of Texas was authorized to make a contract with sundry persons named in the said act, for the introduction and settlement of emigrants upon the vacant lands of the Republic of Texas, upon certain terms and conditions therein expressed, the provisions of which act were extended and made general and perpetuated by a subsequent act, amendatory thereof, approved the fifth of February, 1842; and, whereas, by a joint resolution of the Congress of Texas, "to modify the provisions of an act entitled 'An act granting land to emigrants,'" approved the sixteenth of January, 1843, the President of the Republic of Texas was authorized to make such further contract or contracts with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of the Republic, and as shall not be inconsistent with the provisions of the said act; and, whereas, the said Charles Fenton Mercer is the legal representative of part of the said grantees, one of whom died in London prior to the passage of the act of the fourth of February, 1841, before mentioned, and five others of whom assigned to the said Charles F. Mercer, among others, their interests in the said act, and all contracts made pursuant thereto, by an assignment and transfer of their interests, dated in London the twenty-second day of September, 1841, and the said Charles F. Mercer is desirous to make a new contract in behalf of himself and others, his associates, to be united in one company or association, for the purpose of colonizing part of the ungranted or unappropriated lands of the Republic of Texas:

II.

Now, this contract witnesseth, that the parties thereto have mutually covenanted and agreed, and do hereby covenant and agree, to the terms and conditions of this contract, and bind themselves to each other for the faithful fulfillment of the same, as follows, viz: The party of the second part, for himself and his associates, his and their heirs, executors, administrators and assigns, covenant and agree with the party of the first part, acting in behalf and for the Republic of Texas, to introduce

and settle within the limits hereinafter described by the party of the first part, or within such other limits as may be hereafter prescribed by the President of the Republic of Texas for the purpose aforesaid and in accordance with the provisions of the acts aforesaid and the said joint resolution, and within the term of five years from the date hereof, as many emigrant families as he and his associates can settle within the said limits to be hereinafter described as aforesaid, at the rate of one family for every section of one mile square of vacant or unappropriated land within said limits; and for this purpose the party of the second part and his associates, or their legal representatives, shall cause the unappropriated lands within the prescribed limits to be surveyed, as needed for the purposes of settlement, into sections of six hundred and forty acres or half sections of three hundred and twenty acres each, at their option; and shall cause to be built, from time to time as needed, such number of log cabins, or small houses constructed of other materials, as circumstances shall require, for the comfortable accomodation of each family introduced and settled as aforesaid; the number of families to be settled in each of the five years succeeding the date hereof shall not be less than one hundred in each and every year of the said term; and for the better and more definite description of what is meant by the term family, the following meaning shall be understood to be expressed thereby, viz: that each family shall consist of at least a man and his wife; or of a widower and two or more children—if males, under the age of seventeen years—if females, unmarried; or, if a widow and two or more children, unless one be a son, above seventeen years of age, in which case one child shall suffice; or of two single men, over the age of seventeen years.

III.

And the party of the second part, and his associates, further covenant and agree with the Republic of Texas, the party of the first part, that as soon as they shall receive a title from the government of the Republic to any tract or tracts of 640 acres or of 320 acres of land for the introduction and settlement of the families aforesaid, they will convey to each and every family aforesaid such number of acres of land as shall be agreed between them, the said party of the second part and his associates, and the said families respectively, but not less than 160 acres nor more than 640 acres to any one family; and that they will include in each deed of conveyance to a family a clause of defeasance, requiring such family to enclose with a good fence and cultivate at least fifteen acres of the land so conveyed, and to reside upon the same for three years or forfeit their title to the Republic; or the party of the second part shall name the number of acres stipulated to be given to each family as aforesaid, and the request that the deed of conveyance be made therefor to the several families respectively, or their legal representatives, directly from the government of the Republic; and in that case, the deed for the remaining portion of a section, or of two half sections, as the party of the second part may

desire, shall be made by the government to the said party, or their legal representatives.

IV.

And the party of the first part, in behalf of the Republic of Texas, hereby covenants and agrees with the party of the second part, their executors, administrators and assigns, or legal representatives, that they shall be authorized to introduce and settle emigrants within the limits hereinafter described until they shall have settled therein as many families as will entitle them to each and every alternate section of 640 acres or to each and every alternate half section of 320 acres included, as well as to all other sections therein, according to the terms and conditions herein provided; but the said party of the second part shall not be required, in any case, to settle or receive or purchase any lot or tract of land, section, or half section, or fractional part of a section, which is not of fair quality for agricultural purposes, or which is so far situated in the interior of a prairie as to render it inconvenient for settlement: *Provided, however*, That all the lands which have been legally located within the limits hereinafter prescribed, according to the provisions of subsisting and valid laws, shall not be settled, received, occupied or purchased by the party of the second part under or by virtue of this contract; but no location within the said limits made subsequent to the date of this contract shall constitute any bar to the purchase or settlement of any part of the land hereby set apart and appropriated for colonization by the second party to this contract or their legal representatives.

V.

And the said party of the first part further covenants and agrees, in behalf of the Republic, to give, grant and convey to the said party of the second part and associates, or their legal representatives, one section of 640 acres of land for each family, or two half sections of 320 acres for each and every family, which they shall introduce and settle upon the lands hereinafter described and set apart for colonization: *Provided*, That each alternate section or half section of 640 or 320 acres shall be reserved to the Republic, to be purchased or not by the party of the second part, on the terms hereinafter stipulated; and a full, absolute and perfect title shall be made in the usual mode and form to the party of the second part, or their legal representatives, for each and every section, half section, or other fractional part of a section, to which they may become entitled under the provisions of this contract, and the same shall be conveyed to them as soon as and whenever they shall exhibit to the Commissioner of the General Land Office of this Republic, or other proper officer thereof, in manner and form hereinafter prescribed, the evidence of having surveyed the portion of land for which such conveyance is desired, and that there are comfortable small houses or cabins erected thereon, and families residing therein who have been settled thereon by the said party of the second part, or their legal representatives, the said party paying, or causing to be paid, the expenses of such conveyance, as provided by the act of the fourth of February, 1841, as aforesaid, or if the

said party of the second part shall so request, the government shall convey the title of such number of acres as the party of the second part shall have stipulated to convey to the several families respectively, to said families or to their legal representatives directly; and the title to the residue of each 640 acres, or of any fractional part thereof, shall be in such case or cases made directly to the party of the second part and their legal representatives.

VI.

And the said party of the first part further covenants and agrees, on behalf of the Republic of Texas, that the said party of the second part shall be allowed and receive from the government, as a further compensation for their services and recompense for their labor and expense in introducing and settling the families herein provided for, a premium of ten sections of 640 acres or twenty sections of 320 acres of land for each and every hundred families introduced and settled as aforesaid, but no premium for any fractional number of one hundred families shall be allowed. And whenever due evidence shall be adduced that the party of the second part, or their legal representatives, have settled one hundred families as aforesaid, the said party, or their legal representatives, shall select said premium sections within said limits from among those reserved to the Republic: *Provided*, Such selection shall be, where practicable, of continuous alternate sections, or fractional parts of sections, equivalent in extent to ten sections of 640 acres each; and a full and perfect title to said premium sections so selected or chosen shall be made to the party of the second part, or to their legal representatives, from the government of Texas.

VII.

And the said party of the first part, on behalf of the Republic of Texas, further covenants and agrees with the party of the second part, and their legal representatives, to give and grant to each settlement of one hundred families, made in pursuance of this contract, one section of 640 acres, to be located as near the centre of the settlement as practicable; and, on the payment by such settlement, or by the said party of the second part on their behalf, of the sum of twelve dollars in gold or silver specie, into the treasury of the Republic, to grant one other section of 640 acres to each settlement of one hundred families, in addition to the former; both to be conveyed directly to such settlement to aid them in erecting the necessary buildings for religious public worship and elementary or primary schools.

VIII.

And the said party of the first part, in behalf of the Republic of Texas, further covenants and agrees with the party of the second part, and their legal representatives, that on paying into the public treasury, and obtaining the treasurer's or other proper officer's receipt for twelve dollars paid into the same, and also of the delivery for cancelment to the same or other proper officer of any bonds, promissory notes or other audited liabilities of the Republic, to the amount of six hundred and forty dollars, the party of the second part, or their legal representatives, shall be entitled to demand, and shall

receive from the government, a full and absolute title to six hundred and forty acres of the alternate sections reserved as aforesaid: *Provided*, That previous to any such grant or conveyance the said party of the second part, or their legal representatives, shall furnish due evidence that for every section or fractional parts of a section or sections amounting to 640 acres of the reserved alternate sections, not comprehended in the twelve sections of every hundred granted as premium sections, or for purposes of religious worship and schools, an emigrant family has been introduced and settled in manner aforesaid; and for every part of a section stipulated to be granted to such family, a conveyance, if desired, shall be made directly to such family, or to their legal representatives, on the terms and conditions prescribed as aforesaid relative to the cónveyances to be made to the families introduced and settled in the other sections not reserved as aforesaid; and the conveyance for the residue of each alternate section, or of the balance remaining of the 640 acres of fractional sections, shall in such case be conveyed on the terms aforesaid to the said party of the second part, or to their legal representatives, directly.

IX.

And it is understood, and hereby mutually agreed, between the parties to this contract, that all lands lying within the boundaries hereinafter described, which have not been legally located prior to the date of this contract, shall remain and be held subject to be settled, in manner aforesaid, by the said party of the second part: *Provided*, That any lands within the boundaries hereinafter described, which shall not have been located by the emigrant families hereby authorized to be introduced and settled thereon, or appropriated under the provisions of this contract, within five years from the date thereof, revert to this Republic.

X.

And it is further mutually covenanted and agreed, between the parties to this contract, that no emigrant shall be introduced by the party of the second part, or their legal representatives, who is known to them to have been guilty of any heinous crime, or to sustain a bad moral character; nor shall said party of the second part, nor any family introduced by them, be knowingly allowed to sell or to give or furnish to any Indian any spirituous liquors, nor any powder, lead or fire arms, or any warlike weapons; but the said party of the second part shall cause each male emigrant of the age of seventeen years and upwards to be supplied and bring with him a good rifle, yager or musket, and a sufficient supply of ammunition; and the party of the second part shall keep on hand at all times, in some convenient place of deposit, such quantity of prime ammunition as will supply to each male emigrant of the age of seventeen years and upwards, settled by them, not less than 100 rounds.

XI.

And it is further mutually agreed, between the parties to this contract, that the party of the second part shall cause the lands within

the limits designated in this contract to be surveyed from time to time, and divided into sections of 640 acres, and half sections of 320 acres, so far as the same may be practicable; and where, by reason of the intervention of large streams of water, or navigable rivers, this shall be impracticable, or it be rendered so by prior locations, fractional sections of greater or less dimensions than one-half may be made, and the quantity of land therein estimated and carried to the same account in all respects as the entire sections, by computing fractional sections in quantities of 640 acres, and subjecting them as far as practicable to the same conditions as are herein prescribed in relation to the entire sections or half sections of 640 and 320 acres.

XII.

And of all such surveys, correct plats and copies of the field notes shall be made, denoting therein the ranges and number of the section or half sections, and the fractional sections exceeding or falling short of one-half section; and the same, or a correct copy thereof, shall be returned to the General Land Office of the Republic; and as the party of the second part shall become entitled to any section or number of sections, according to the terms of this contract, they shall be marked on said plat; and whenever the party of the second part, or their authorized agent or legal representative, shall exhibit to the Commissioner of the General Land Office of the Republic a certificate, under oath, subscribed by two witnesses, and certified by some person qualified by the laws of Texas to administer an oath, that the said party of the second part, or their legal representatives, have caused to be built a small, comfortable house or cabin, or any number of such houses or cabins, on the parcel or parcels of land which they are obligated by this contract to convey to each family, or the several families respectively, and have actually settled a family, or several families respectively, therein, they shall immediately receive thereafter a full and absolute conveyance from the government of the Republic for as many sections of land of 640 acres, or half sections or other fractional parts of sections equal in amount to 640 acres, as there shall be families certified to in such certificate or certificates: *Provided*, That no settler under seventeen years of age, when introduced into the Republic, shall afterwards be entitled to receive lands in his own right as an original settler under this contract; and no family, or legal representative of a family, introduced and settled by the party of the second part, or their legal representatives, shall be named as a settler in more than one certificate, or shall entitle the said party of the second part, or their legal representatives, to more than one section of land; but if the party of the second part, or their legal representatives, shall so request, the government shall convey the title acquired by each family as aforesaid directly to such family, and the residue of the said 640 acres to the party of the second part, or to the legal representatives of said party.

XIII.

And it is further mutually covenanted and agreed, that correct records of all such conveyances shall be duly kept in the General

Land Office of the Republic; and whenever it shall appear that titles have been made, or have accrued, according to the terms of this contract, to the party of the second part, or to their legal representatives, for the settlement of one hundred families, the government of the Republic shall convey to the party of the second part, or to their legal representatives, ten premium sections, to be selected or chosen as aforesaid, and in a like manner, for each and every settlement of one hundred families, the two additional reserved alternate sections, for religious purposes and schools, within such settlement, on the terms and conditions aforesaid; and so on for every other one hundred families, until the expiration of the term of years aforesaid allowed for the colonization of emigrants under this contract shall have expired.

XIV.

And it is further mutually agreed between the parties to this contract, that until the party of the second part, and such associates as they may make by transfer or assignment of a part or parts of their interest in this contract and the lands set apart thereby for colonization on the terms and conditions herein expressed, shall obtain a charter or act of incorporation from the Congress of this Republic, they shall be authorized to appoint, by a majority of their number *in interest*, in such mode and by such title or denomination as a majority in interest of the said association may agree on, in some instrument of writing or articles of agreement and association to be drawn up and subscribed by such majority, some one or more person to act under a common name to be assumed by the said association, and, under such instrument of writing, to invest such person or persons with full authority as their trustee or trustees, to receive and hold, for their benefit and on their behalf, according to such rules as they or a majority in interest of their company or association may prescribe, in writing, from time to time, the titles and conveyances of such lands, bonds, obligations, notes or money, as they shall agree, by a majority in interest of their number, to confide to the keeping or to the use of their said trustee or trustees.

XV.

And should the said majority in interest of the party aforesaid, and their associates, at any time desire to return or surrender such title or conveyances as they may have received in the manner aforesaid, through their trustees to the government of the Republic, on due evidence of such desire, made known to the said government, or to the proper officers or officer thereof empowered to make conveyances, the said government, officers or officer, shall make and convey new titles to the same lands, to such person or persons, party or parties, directly by name, as the party of the second part of this contract, or a majority in interest of the association, which such party of the second part and their associates may, by some instrument of writing, request, and in the absence of such act of incorporation, as the party of the second part, their associates or legal representatives, contemplate; they shall, from time to time, until such act be obtained, cause certified copies, attested according to such evidence as the laws of this

Republic prescribe for foreign conveyances of land when such land is conveyed by indentures or contracts made without the limits of this Republic, to be transmitted to the Department of State, or other proper department of this government, for safe keeping and reference, as occasion may require.

XVI.

And within six months from the date hereof, and once within every six months thereafter, until such act of incorporation shall have been obtained, the association formed as aforesaid shall transmit a list of their co-partners, and a statement of the share or shares of each in the stock or property of the association or company, and of the common name or title assumed by them or a majority of them in interest, to the said department.

XVII.

And it is further mutually covenanted and agreed, that if an act of incorporation be obtained by the said association or company to be formed as aforesaid, all such deeds as may have been previously made to the same, or to their authorized trustee or trustees, may be surrendered to this government, in manner aforesaid, as soon as or at any time after the said act of incorporation shall have been obtained and the company organized under or by virtue of such act; and in that case new deeds, corresponding with the new form of the association aforesaid, shall be executed and delivered in exchange for the former, to the proper officer of such incorporated association, for the use and benefit thereof; the said party of the second part and their associates or lawful representatives paying all legal expenses attending such deeds of conveyance.

XVIII.

And it is further covenanted and agreed by the parties to this contract, that the unlocated lands included in the following boundaries shall remain and be held by the government of this Republic for the purposes herein set forth until the end of five years from the date hereof, and shall be considered as set apart exclusively of all future claims to be colonized in the manner aforesaid by and for the benefit of the party of the second part aforesaid and of this Republic, viz.:

XIX.

Beginning on Red River, opposite to the east bank of the branch thereof emptying into the same from the United States of America, called the False Washita, and running thence due south fifty miles; thence due east fifty miles; thence due south sixty-five miles; thence by a straight course to a point on the Rio Trinidad, or river Trinity, on the bank thereof opposite the lower or southern bank of Cedar Creek where the said creek empties into the said river; thence across the river Trinity to said bank of Cedar Creek; thence by a straight line to the lower or southern bank of Aguila Creek where the said creek unites with the river Brazos; thence up the said river Brazos, according to the meanders of the same, and binding thereupon, to the intersection of the same by the new Indian boundary, described in the act of Congress entitled "An Act to provide for the establishment and

maintainance of peace and to regulate friendly intercourse with the Indians," on which was grounded the treaty with the Indians made in September last; thence with said boundary, wherever the same may be run and established under the said act and the treaty made, or to be made, pursuant thereto, to the southern boundary of the tract of land set apart for colonization by a contract bearing date the twenty-sixth of July, 1842, between Isaac Burnham, acting for himself and as agent for and in behalf of W. S. Peters and others, of the first part, and Sam Houston, President of the Republic of Texas, on behalf of the said Republic, of the second part; and thence with the said Indian boundary, or the southern boundary of said tract of land set apart as aforesaid for colonization by the said contract, to the southeast corner of said tract set apart as aforesaid; thence with the east boundary of said tract due north, or with the said Indian boundary, should the same be east of the said eastern boundary aforesaid, to Red River; and thence to and with the meanders of Red River down the south margin thereof to the northwest corner of the tract of land set apart for colonization, as aforesaid, by a contract made pursuant to the act of Congress of the fourth of February, 1841, between the President of the Republic, of the first part, and W. S. Peters and others, of the second part, which contract bears date the twentieth day of August, 1841; thence with the western boundary of said tract and of another tract set apart, as aforesaid, by a contract between the same parties for the same object, running due south to the southwest corner of said last named tract; and thence with the southern boundary of the same to the southeastern corner thereof; and thence with the eastern boundary of said tracts to the beginning of the first of the two last described tracts, at the mouth of Big Mineral Creek, where the same empties into Red River; and thence with the meanders of said river and binding thereon to the beginning, opposite the lower bank of False Washita, where the same empties into the Red River.

XX.

And it is further covenanted and agreed between the parties to this contract, that unless the party of the second part, or their legal representatives, shall, prior to the first day of May, 1845, have introduced and settled on the land above mentioned, according to the tenor of this contract, one hundred families, all right and title of the said party of the second part, or their legal representatives, to proceed further in the execution of this contract, shall cease and determine from the moment of such default, but such default shall not work or operate retrospectively, but leave to the party of the second part, and all persons claiming under them, whatever right, title or interest they may have acquired from the action of the party of the second part and their legal representatives, prior to such default, to the same extent as if no such default or failure had occurred; and in like manner, and under like qualifications, the right of the said party to proceed further under this contract shall cease and determine: *Provided*, 250 families be not introduced and settled by them in manner aforesaid on or before the expiration of two years from the date hereof; and

so, in like manner, one hundred and fifty additional families shall be settled on the said lands, according to the terms of this contract, by the said parties of the second part, or their legal representatives, within each of the three remaining years, or the right of the said party further to proceed under this contract, through the full term of five years from the date hereof, shall on the occurrence of any default, as aforesaid, utterly cease and determine: *Provided*, as before expressed, no such default shall operate otherwise than prospectively, either in relation to the said second party to this contract, or to the emigrant families actually settled, or any person or persons claiming by, through or under them, or any of them.

XXI.

And it is further covenanted and agreed between the parties aforesaid, to obviate any misunderstanding of the terms on which it is agreed, that the party of the second part may purchase and settle any number of families on the alternate reserve sections, as aforesaid; that the like compensation or recompense in land for every hundred families settled thereon, and the like provision for public worship and elementary schools, shall be made to the party of the second part and their legal representatives, and to each settlement, as in the case of the introduction and settlement of the same number of families upon any other sections not so reserved; and for such premium sections and the two sections allotted for religious purposes and schools, the party of the second part shall not be required to pay more than the twelve dollars in specie required by the said joint resolution of the Congress, approved the sixteenth of January, 1843.

In testimony whereof, the party of the first part to this contract hath hereunto subscribed his name and caused the seal of the Republic of Texas to be affixed; and the party of the second part hath subscribed his name and affixed [L. S.] his proper seal, on the day and year in this contract first mentioned. Done at the town of Washington, on the twenty-ninth day of January, and of the Independence of Texas the eighth.

Attest: SAM HOUSTON.

ANSON JONES, Secretary of State.

CHARLES F. MERCER, [L. S.]
For himself and such associates as he may choose.

DEPARTMENT OF STATE, January 30, 1845.

The undersigned hereby certifies that the foregoing is a copy of the original colonization contract made by Charles F. Mercer *et al.*, with the President, on file in the archives of this office.

In testimony whereof, the official seal of this department has been hereunto affixed.

J. C. ELDRIDGE, Chief Clerk.

No. 5.

ARTICLES OF ASSOCIATION.

Agreement between Charles F. Mercer, Original Grantee, of the Republic of Texas, and the Stockholders of the Texas Association.

[The original articles of association are not sectionized, but, for greater convenience of reference, this is put into paragraphs, as numbered below.]

I.

This agreement, made this ..... day of ....., A. D. eighteen hundred and forty ....., between Charles Fenton Mercer, of the ....., and ....., of the second part:

Whereas the party of the first part has, by an agreement with the Republic of Texas, acting by Samuel Houston, President thereof, dated 29th Jannary, 1844, obtained a grant of lands of great extent, estimated at 8000 square miles, lying on the rivers Trinity and Brazos, in the Counties of Fanin, Nachodoches, and Robertson, of said Republic, and binding upon and embracing, besides the quantity above mentioned, about 2200 square miles of certain tracts of land granted by said President Houston, on the 25th of July, 1842, to W. S. Peters and others, to which lands they have prior right, should they choose to avail themselves thereof; upon condition, nevertheless, that the party of the first part to this agreenment, and such associates as he may choose, shall, within certain limited periods, introduce and settle on said lands a certain number of emigrant families, on the terms in said agreement of the 29th of January, 1844, particularly set forth; for all which particulars and all other matters pertaining thereto, reference may be had to the said agreement on file in the office of the Department of State of the said Republic, and to the printed copy thereof, hereto annexed; and the party of the first part to this agreement is desirous to choose the part....of the second part to be.....
.....
of his associates, according to the terms for the said agreement, and to the extent of the interest in the same, which is herein set forth and agreed upon; such interest being designed to be a hundredth part of the whole interest of the said party of the first part in the said agreement between him and the said Republic, dated 29th January, 1844:

II.

Now, this agreement witnesseth, that the party of the first part thereto, for and in consideration of the sum of one dollar, to him in hand paid, at the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the further sum of .....
.....
to be paid in manner hereinafter provided, and of the several covenants hereinafter expressed, hath conveyed, assigned, and set over to the part.... of the second part one-hundredth part of all his right, title, interest and immunities given, granted, conveyed and made over to him, the party of the first part to this agreement, by the said agree-

ment between himself and Republic of Texas of the 29th January, 1844; and the said party of the first part hath chosen and hereby chooses the said part....of the second part to be ..... of his associates, for the execution of the said agreement between him and the Republic of Texas, subject, neverthless, to all the conditions and limiations hereinafter expressed, and according to the true intent and meaning of said agreement between the party of the first part and said Republic, and of this agreement also.

III.

The party of the first part, for himself and the associates he hath chosen or may hereafter choose, and for his and their legal representatives, covenants and agrees with the part.... of the second part and ..... legal representatives, as follows, viz.:

To apply the sum of money named as the consideration of this agreement, to the objects of the agreement aforesaid of the 29th January, 1844, between himself and the Republic of Texas, according to the best of his judgment and ability; replacing thereby such sums as he has expended, and providing for such expenses as he may hereafter incur in the execution of said agreement between him and the said Republic, charging to the association to be formed by this and similar agreements nothing by way of compensation for his services or for salary as chief agent of such association, but only his personal, traveling, and other expenses, incurred or to be incurred by him as chief agent, for conducting the said agreement, and the scheme of colonization proposed by it, to a successful issue.

IV.

And the said party, moreover, binds himself to provide, as soon as practicable, one or more suitable and trustworthy persons to act, in the order in which they shall be named, as chief agents of the association to be formed as aforesaid, in event of the death, sickness, inability from any cause, or disinclination further to act, of him, the said party of the first part to this agreement.

V.

Such successor shall have every power and authority vested or recognized by this agreement in the first party thereto; and in case of the necessity of resorting to such other agent or successor, as his interest will be much less than that proposed to be retained in the former agreement by the chief agent hereby created, any successor of said agent shall be entitled to receive a reasonable compensation for his services over and above his actual expenses while engaged in the service of the association: *Provided*, That such extra compensation shall not exceed $2000 per annum; and shall be charged upon and paid out of the common funds of the association.

VI.

The names of the persons appointed as aforesaid, to succeed the party of the first part as chief agent in case of his death, disability, or declining to act, shall be transmitted to the Department of State of the Republic of Texas, to be there filed or recorded for the information of all persons interested therein; and shall be in writing sub-

scribed by the party of the first part to this agreement; and from the time that some one of the persons so named and entitled by priority to act shall enter upon the duties of chief agent, he shall have all and every power vested by this agreement in the said party of the first part thereto; but nothing herein contained shall divest the party of the first part of any share or part of any share of his interest in the said agreement between himself and the Republic of Texas, except the share hereby conveyed to the part.... of the second part to this agreement.

VII.

The party of the first part, so long as he continues to act as chief agent of the association hereby created, and each of his successors, so long as he shall act as such, shall have every power necessary or expedient for carrying into effect the agreement of the twenty-ninth of January, 1844, and this agreement.

He shall have, especially, the following powers, though, by their enumeration, it is not designed to exclude others, which circumstances may render necessary or proper, viz.:

The name of the association shall be (a common name being authorized by the said agreement of the twenty-ninth of January last) "The Texas Association;" and the chief agent shall subscribe his name accordingly to all acts of his in behalf of the association, and by such subscription shall bind the parties of the second part, as well as himself and all other associates under the agreement of the twenty-ninth of January aforesaid.

VIII.

His successor as chief agent shall have power in like manner and to like extent to bind the said first party, and all persons claiming by, through, or under .....: *Provided*, That no associate, nor the party of the first part to this agreement, shall be bound to an extent beyond the interest they respectively hold in or under the said agreement of the twenty ninth of January, 1844, and the sum which such associates bind themselves to pay, by this and like agreements, toward the funds of the association.

IX.

The chief agent shall have, also, the following powers, viz.: to borrow money on the credit of the common funds in lands, or debts due to "The Texas Association," or to become due, whenever, in the opinion of the chief agent, it shall be deemed expedient for the interests of the association.

X.

He shall have power to sell or hypothecate any of the lands of the association for the purpose of paying any debts thereof, or purchasing for the common benefit, and colonizing the sections of land reserved to and by the Republic of Texas out of the grant aforesaid to the party of the first part and such associates as he may choose.

XI.

He shall have power to grant to any emigrant family, for reasons seeming to him good, more than the minimum quantity of a quarter

section of land, on such conditions as he may please to annex thereto; and to sell to such family, or any other, the residue of the section, or any part thereof.

XII.

He may make contracts for the improvement of any of the lands of the association, whenever he may deem such contracts expedient, and pay for such improvement out of the lands or moneys of the association.

XIII.

He shall have power to lay in, by purchase, and to sell to such emigrants as may come unprovided, necessary food, valuable trees, shrubs or seeds, and farming and garden tools; and, in cases of necessity, to lend to the emigrants small sums of money out of the funds of the association, to be thereafter repaid to the association.

XIV.

He shall contract for the survey and distribution into sections, and practical parts thereof, of such lands as may be required from time to time for the immediate settlement of the emigrants; and may purchase with the lands or money of the association, for the mutual benefit of the association and the vender, any liabilities of the Republic of Texas, and invest them in the purchase and colonization of the reserved sections, or any part of them, according to such terms as he may deem advantageous to the association.

XV.

He may contract for the passage of emigrant families from the United States of America, or their territories, or from any country in Europe, to the lands to be colonized, on such terms as he may deem expedient for the association; and charge upon the lands to be granted to the several emigrant families, either by mortgages or deeds of trust, or other security, all advances made for their transportation, or their other necessary expenses or outfit.

XVI.

He shall have power to sue for and recover any lands occupied or claimed under any prior grant or location, within the boundaries of the tract aforesaid set apart for colonization, which he shall deem to be illegally granted or located, or to compromise all or any claims founded on such occupation or prior grant or location, on such terms and conditions as he may consider expedient. And, for as much as the various duties of the chief agent will be, of necessity, spread over so large a surface as to render it beyond the power of one man to perform them all in due time, he shall have power to appoint, whenever he may deem it expedient, and to fix and pay the compensation of any number of sub-agents, and to prescribe their respective duties: *Provided*, That all expenses incurred by the chief agent or sub-agents shall be chargeable upon the funds provided by this and similar contracts or agreements between the party of the first part and his associates, and upon the lands of the association, and the money, notes, and bonds derived from the sale or hypothecation thereof; but neither the party of the first part nor any of his associates shall be

bound by any act of his sub-agents, or by any contract of his as chief agent, beyond his or their express agreement in writing, and their interest in the common property acquired or held for their benefit; and to this extent each and every associate of the party of the first part, as well as the said party himself, shall be bound for all excess of expenditure beyond the funds derived from the sale of the forty-hundredths, being forty shares, of the entire interest to be acquired by the agreement of the party of the first part with the Republic of Texas, and in the exact and just proportion of the number of their respective shares; the party of the first part having granted five shares of stock to Dr. Daniel Rowlett, of Texas, late of Virginia, without any pecuniary consideration, for services to be rendered to the association in Texas, and having determined for the present to reserve fifty-five shares of his whole interest to himself and his legal representatives, and to sell only forty shares of his entire interest, in order, with the funds to be derived therefrom, to carry on with promptitude and success the plan of colonization devised by his agreement of the twenty-ninth of January, 1844, with the Republic of Texas.

XVII.

And the party of the first part expressly reserves to himself the right to retain or dispose of as he pleases, for his own use, the fifty-five shares of his reserved interest in the said agreement of the twenty-ninth of January, 1844, between himself and the Republic of Texas: *Provided, however,* That no disposition thereof which he may make shall withdraw any part of his reserved interest aforesaid from a proportional charge for all expenses of the association exceeding in the aggregate the sum derived from the sale of the forty shares set apart as aforesaid, and from such other resources as the fees paid by the colonists for their surveys and plats and the sale or other application of the lands of the association may supply.

XVIII.

And, inasmuch as it is desirable that the various shareholders of "The Texas Association" shall become actual settlers and cultivators of the soil of Texas, which they may acquire by means of their association under this agreement and other similar agreements founded on the agreement aforesaid of the twenty-ninth of January, 1844, between the party of the first part to this agreement and the said Republic, it is further understood and agreed by the parties to this agreement, and they mutually covenant to that end, that the party of the first part shall retain and appropriate to his own use, at any time within the five years allowed by the Republic of Texas for the colonization of the lands described in the agreement of the twenty-ninth of January, 1844, between the said Republic and the said party of the first part, any sections or parts of sections acquired by the association under or by virtue of said agreement of the twenty-ninth of January, 1844: *Provided,* That the whole extent of any lands so retained or appropriated to his own use by the party of the first part shall not exceed six per cent of the whole quantity of land at any time

so acquired; such quantity to be estimated and charged to the party of the first part in the final distribution among "The Texas Association" of all the lands acquired by them, as so many acres of unimproved lands of average value with the lands in general of the association, however much they may have been improved, or may have appreciated in value from their vicinity to other improved lands.

XIX.

And the power hereby recognized and conceded to the party of the first part to set apart and appropriate to his own exclusive use six per cent of all lands acquired by the association shall, in like manner, extend to the sections reserved by the Republic in the agreement aforesaid of the twenty-ninth of January, 1844, with this condition: that on the exclusive appropriation of six per cent of the reserved sections acquired by the association, if the same shall have been purchased by the funds thereof, whether consisting of lands or money, the party of the first part or his legal representative shall repay any sums the association may have expended therefor, or replace an equivalent thereto in other lands: but if the reserved sections shall have been paid for by the emigrant families in the purchase of their lands, the association shall be deemed to have no claim for reimbursement of any purchase money.

XX.

In like manner any holder of a share of one-hundredth part or more of the entire interest of the association may, in virtue of his being a member thereof, set apart for his own exclusive use one per cent of the common lands acquired by the association: *Provided*, He shall remove to Texas, or occupy and improve the same by his agent. And it shall be a sufficient evidence to set apart any such land for separate or exclusive use, to describe it by its proper bounds, and declare such intent by a written instrument, under the hand and seal of the shareholder, and recorded in the county in which the land lies that is so set apart.

XXI.

And it is further covenanted and agreed by the parties to this agreement, that at the end of the term granted by the Republic of Texas, for the colonization of the lands set apart therefor by the agreement aforesaid of the twenty-ninth of January, 1844, there shall be a just partition of all lands or other property acquired by "The Texas Association."

XXII.

In this partition the distribution shall be by lottery where equal interests are to be allotted, under the agency of three commissioners, to be appointed by the President of Texas, for the time being, at the request of any three associates, or of any person having three shares of the one hundred into which the whole stock of the association is considered as divided. Should the President decline acting on such request, the partition shall be made, whatever be the authority conducting or charged with it, by distributing the whole lands of the association into one hundred parcels of as equal quantity and value as prac-

ticable, and allowing any shareholder of one or more shares to draw one parcel for every share he holds. Every shareholder who shall have already appropriated to his exclusive use the whole or part of the land to which he is entitled shall account for the same by surrendering all, or an equal quantity, out of the parcel he shall have drawn, and all the lands so surrendered shall be again classed and drawn out by those associates or shareholders who may be entitled thereto, according to their respective proportions.

XXIII.

All sums of money shall be divided into equal portions, one hundred in number, and paid over according to the respective interests of the shareholders Any sums due to the association shall be collected by the chief agent at the date of the said partition, and paid over, in like manner, as speedily as practicable, to the persons entitled thereto. And the said party of the first part, for himself and his legal representatives, and his successor as chief agent, or such of them as shall enter upon that trust, covenants with the part.... of the second part and .... legal representatives, to render once at least in every six months to the Department of State of the Republic of Texas, or at any time at the request in writing of any shareholder or holders of five shares of the common stock of "The Texas Association," a full and true account of all moneys expended by him, or as far as he knows the same under his authority, and for "The Texas Association," under general heads of expenditure, distinguishing therein his personal expenses from all other heads, and stating all sums received by him or his sub-agents on acconnt of his or their agency, and detailing by their general titles and objects all contracts made by him or them, with the names of the contractors, their places of abode where known, and the dates of their respective contracts; also the number of emigrant families actually settled on the lands aforesaid; and whatever else may tend to show the actual condition of the affairs of "The Texas Association" and their future prospects.

XXIV.

Finally, the second part.... to this agreement, for ..... heirs, executors, administrators and assigns, covenant with the party of the first part thereto to pay to the said first party, as agent of the association, or to such person as he may appoint to receive the same, or to his successor in the chief agency of the association, or to such person as he may depute to receive the same, one-fifth part, namely,.....
.....
expressed in this agreement, ...
.....
..... and the like sum on the first day of October of each of the years ....., until the entire sum of..... hundred dollars be paid, as before stipulated: *Provided*, That if at any time for the space of thirty days after the day of payment, or the same shall become due, any one of said installments be not paid at such place as shall be previously named by said agent or his successor, all the right, title and interest of the part.... of the second part,

and of any and every assignee, or other legal representative thereof, and of all persons claiming by, through, or under him, them, or any of them, shall become utterly void; and this agreement, and every clause thereof, shall cease and determine, as if the same had never been made; and all right, title, or interest in and to the share of the stock of "The Texas Association" hereby conveyed shall revert to the party of the first part, or to his legal representatives, to be held, or otherwise disposed of, for the benefit of "The Texas Association" hereby formed: *Provided*, That if the party of the first part shall himself pay the sum or sums due, and thereafter as they become due, for the said share for the use and benefit of the association, he may hold the same on his own private account, in like manner as he holds the fifty-five shares herein reserved for his exclusive benefit.

In testimony whereof, the parties aforesaid have hereunto set their hands and seals, on the day and year in this agreement first mentioned.

Test:

No. 6.

ACT OF JANUARY 30, 1844.

Hartley, p. 652.

An Act to repeal all Laws now in force authorizing the President to form Colonization Contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with.

ART. 2110. [1] *Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled*, That all laws now in force, authorizing the President to make contracts with individuals, or companies, for the purpose of colonizing and settling portions of the unappropriated lands of the Republic, be, and the same are hereby, repealed.

ART. 2111. [2] *Be it further enacted*, That all such contracts, already made, the conditions of which have not been strictly and rigidly complied with, or hereafter fail to be complied with, are hereby declared forfeited; and no extension of time or privilege shall be granted to said contractors for the purposes of carrying such contracts into effect.

ART. 2112. [3] *Be it further enacted*, That no further contract or contracts shall be made by the President with such individuals, who have already made contracts for the purposes above specified, whereby any further time, privileges or facilities may be granted to said contractors; and the "Joint Resolution to modify the provisions of an act entitled 'An act granting land to emigrants,' approved January 16, 1843," so far as the same relates to any prospective action of the President, in regard to modifying said contracts, or extending the time as now embraced in said contracts, whereby the privileges of said company, or their assigns or representatives, mentioned in said

joint resolution, may be increased, be, and the same is hereby, repealed.

ART. 2113. [4] *Be it further enacted*, That it shall be the duty of the Attorney-General, under the directions of the President, to ascertain as fully as possible all the proceedings of said contractors, how far they have complied with their conditions, and in what respects they have failed, and report fully on said subject to the next Congress of the Republic, in order that they may take such further action thereon as they may think proper.

ART. 2114. [5] *Be it further enacted*, That it shall be the duty of the President, whenever he ascertains that any of the colonization contracts heretofore made, have been forfeited by a failure to comply with all their provisions, on the part of the contractors, to issue his proclamation to that effect, immediately.

No. 7.

JOINT RESOLUTION OF FEBRUARY 3, 1845.

Hartley, p. 660.

Joint Resolution to establish the limits of the Mercer Colony.

ART. 2145. [1] *Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled*, That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land actually surveyed and marked by the first day of April next.

ART. 2146. [2] *Be it further resolved*, That a failure to comply with the provisions of the above section, shall work a forfeiture of their contract.

ART. 2147. [3] *Be it further resolved*, That no person shall be recognised as provided for in said contracts, who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of lands as though they had been introduced as provided for in said contract; and that this act take effect from and after its passage.

No. 8.

JOINT RESOLUTION U. S. CONGRESS, MARCH 1, 1845.

Hartley, p. 44; 5 U. S. Stats. at Large, p. 797.

Joint Resolution for annexing Texas to the United States.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to

the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved*, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to-wit: *First.* Said State to be formed subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbours, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery or involuntary servitude (except for crime) shall be prohibited.

3. *And be it further resolved*, That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the

United States shall be agreed upon by the governments of Texas and the United States; and that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct.

Approved March 1, 1845.

No. 9.

JOINT RESOLUTION OF CONGRESS OF REPUBLIC OF TEXAS, JUNE 23, 1845.

Hartley, p. 46.

Joint Resolution giving the consent of the existing Government to the annexation of Texas to the United States.

WHEREAS, The government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the first and second sections of the resolution of the Congress of the United States, of March 1, 1845, *supra.*]

AND, WHEREAS, By said terms, the consent of the existing government of Texas is required; therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the preamble to this joint resolution.

SEC. 2. *Be it further resolved,* That the proclamation of the President of the Republic of Texas, bearing date May 5, 1845, and the election of deputies to sit in convention at Austin, on the fourth day of July next, for the adoption of a constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing government of Texas.

SEC. 3. *Be it further resolved,* That the President of Texas is hereby requested immediately to furnish the government of the United States, through their accredited minister near this government, with a copy of this joint resolution; also to furnish the convention to assemble at Austin, on the fourth of July next, a copy of the same. And the same shall take effect from and after its passage.

Approved June 23, 1845.

No. 10.

ACT OF JUNE 25, 1845.

Hartley, p. 662, *Arts.* 2151, 2152.

An Act requiring the Commissioner of the General Land Office to issue patents in certain cases.

ART. 2151. [1] That the Commissioner of the General Land Office be, and he is hereby, authorized and required to issue patents to all persons otherwise legally entitled to the same, notwithstanding the lands for which said patents are or may hereafter be demanded may be within the limits designated in the colonization contract made on the twenty-ninth day of January, one thousand eight hundred and forty-four, between Sam Houston, then President of the Republic of Texas, acting in behalf of the Republic, and Charles Fenton Mercer and his associates: *Provided*, The locations or surveys, in pursuance of which said patents are or may be demanded, were filed in the office of county surveyor in which said lands may be, or made by his direction, previous to notice to said surveyor of the existence and territorial limits of said contract of colonization: *Provided further*, That nothing herein contained shall be so construed as to declare that any certificate located within any colony limits, is not as valid as if located upon any of the vacant domain of the Republic.

ART. 2152. [2] The official certificate or certificates of said surveyor or surveyors, shall be sufficient evidence to the Commissioner of the General Land Office of the receipt of said information or notice by said surveyor or surveyors, in the first section of this act mentioned.

No. 11.

EXTRACTS FROM JOURNAL OF CONVENTION OF 1845.

The 21st section of general provisions, as reported by the committee, was as follows:

SEC. 21. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be reinvested, revived, or reinstated, by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.

Monday Morning, August 18, 1845.

ORDERS OF THE DAY.

The General Provisions, being first in order, was taken up.

Mr. Rusk offered the following, as a substitute for the 21st section:

"Whereas, it is believed that the colonization contracts heretofore entered into by the President of Texas, as well as the laws authorizing said contracts, assigning large tracts of country to certain individuals, for the purpose of colonization, were unconstitutional, and calculated, in their operations, to deprive the citizens of Texas of their just rights, and that the terms annexed to them have not been complied with by the contractors;

"The Legislature is prohibited from extending any further time to the contractors, or dispensing with any conditions attached to them; and they shall, at their first session, pass such laws as may be necessary to institute judicial investigations, for the purpose of enquiring into and annulling said contracts: *Provided*, They are proven to be illegal and void: *Further provided*, The actual settlers already in said colonies shall be guaranteed in their just rights to their quantum of land, as settlers."

Mr. Mayfield offered the following amendment to the 21st section:

Strike out, "but the rights to lands of actual settlers already introduced, in conformity with the terms of the contract, are hereby guaranteed," and insert, "*Provided, always*, That any actual colonists who shall be residing within the limits of any of the said several colonies at the time of the final action of the United States Congress upon this Constitution, and shall be engaged in the cultivation of the soil, or any of the mechanic arts, shall be entitled to the land secured, or attempted to be secured, to him, her, or them, by virtue of said colonization laws or contracts."

Mr. Runnels offered the following amendment to Mr. Mayfield's amendment:

Strike out, "the final action of the United States Congress upon this Constitution," and insert, "the time of the adoption of this Constitution by the people of Texas;" and strike out the words, "secured or," in the tenth line.

Accepted by Mr. Mayfield.

On motion of Mr. Lipscomb, the Convention adjourned until 4 o'clock, P. M.

4 o'clock, P. M.

The Convention met pursuant to adjournment. Roll called — quorum present.

On motion of Mr. McGowan, Mr. Moore was excused from attendance on the Convention on account of sickness.

The 21st section of the General Provisions together with Mr. Mayfield's amendment, were taken up.

The question on Mr. Mayfield's amendment was debated at considerable length, and no action taken.

On motion of Mr. Zandt, the Convention adjourned until half-past 8 o'clock to-morrow morning.

DEBATE.

The 21st section being before the Convention,

Mr. JEWETT said: Before the vote is taken, Mr. President, I wish to address the Convention in favor of the section proposed, and as suc-

cinctly as in my power to give a summary of the laws authorizing the creation of these contracts, a brief history of the proceedings relating to them, and a statement of their present condition. I will do this with as little prolixity as possible. I propose in a few words to state the laws authorizing and regulating the creation of these contracts, and to show the justice and expediency of suspending them. The first act, authorizing the creation of colonization contracts under the laws of Texas, was passed in 1841. It authorized the President of the Republic to make a contract with W. S. Peters, Daniel S. Carroll, and others, for colonizing and settling vacant lands on certain conditions; that they were to introduce a number of families, to be specified in the contract, within three years, etc. The President was authorized to designate certain boundaries. It provided that not more than 640 acres of land, to be located in a square, should be given to any family comprehended in the contract; that all expenses attending the selection of the land, the surveying, title, etc., should be paid by the contractor; it authorized the President to allow the contractors for their services ten sections of land for every hundred families introduced, as a donation. The contractors were required to have one-third of the whole number of families contracted for within the limits of the Republic before the expiration of one year from the date of the contract.

In the succeeding year another act was passed, which extended the provisions of the first law, and made a general law, authorizing the President to make contracts with any number of persons with whom, in the exercise of his discretion, he might think proper to make them. I will read this second act, passed in 1842. The first law made provision for a special contract; this, for an unlimited number of the same character.

[Here Mr. Jewett read the act referred to. He continued:]

The second section of this act provides that all the rights accruing to W. S. Peters and his associates, by the provisions of the former act, and all the duties, obligations, and conditions imposed by the same on Peters and others, should be extended to such other companies as might be organized under the provisions of this act.

In 1843, again, a joint resolution was passed relative to colonization contracts, entitled a "Joint Resolution to modify the provisions of an act entitled 'An act granting land to emigrants.'" The preamble recites that a certain contract had been entered into with Carroll, Peters and others, and set forth the expendiency of modifying some of its provisions and extending some of the privileges before granted, in consequence of the contractors having been unable to fulfill the conditions and introduce the required number of families within the time designated. This permitted the contractors to introduce any number of families, not exceeding ten thousand in all, upon the same condition as before. It required that the grantees should survey the land assigned to them, as before provided; it provided that they should be required to settle or receive such lots only as should be of fair quality for agricultural purposes, and that whenever they should have com-

pleted the surveys of any number of sections, and built a corresponding number of small comfortable houses or log cabins, and placed families therein, they should receive a title from the government to one section of 640 acres for each family so introduced and settled, etc. It provided further, that in case of forfeiture the parties should only be affected prospectively; and further, that the Cherokee lands should be exempt from the provisions of the act.

Such was the situation of the laws upon this subject during the year 1843. I believe that the contractors had but little success in introducing families, and at that time,—I may state it distinctly and boldly,—not one of the contractors had ever performed the conditions specified in their contracts; they were out of existence; they were all forfeited; and the government had then the authority and would have been justified in resuming the lands embraced within the limits of the colonization contracts. At this period the attention of the Commissioner of the General Land Office was attracted to the subject, and in his annual report for 1843 he calls to it the attention of Congress. The position occupied by the Commissioner (Col. Thos. W. Ward) and his acquaintance with the subject, entitle his suggestions to respect. I will, therefore, solicit your attention to a short extract from the communication to which I have referred, relative to the colonization contracts.

[Here Mr. Jewett read the following extract from the annual report of Thos. Wm. Ward, Commissioner of the General Land Office, for 1843.]

"The law granting lands to emigrants, approved January 4th, 1841, and the amendatory law thereto of the 6th Congress, are illegal, impolitic, and objectionable, on several grounds. The several laws granting lands to emigrants have induced many to come to this country under the belief that they could select their headright claims from any of the vacant lands in the Republic; the donations to soldiers had likewise caused many to remain in the field when there was an apparent necessity for them. Script has also been bought from this government, solely from the belief that the vacant lands of the Republic would remain open for locations of all kinds of claims issued by the government, and that the only loss or prejudice that the holders of claims would be liable to sustain would arise from their own tardiness and negligence in not securing the best land before others having equal claims; but they did not suppose that the government would prejudice their rights by such wholesale donations of the best and most valuable lands. The unsettled state of the country has heretofore prevented them from making location on the land that has been granted to these colonies. The land office is not yet open in Bexar county, where the land reserved to Fisher & Miller's colony lies, owing to the records of that county having been sent, during the invasion of March, 1842, to Gonzales for safe-keeping; and until a short time since, no locations could conveniently be made on the immense tract included in the contract made with Peters and others; many of the numerous holders of different kinds of claims issued by this gov-

ernment, would, without doubt, have taken advantage of the first favorable opportunity to have located their claims on these lands contracted away by the government. The grants of headright certificates to emigrants, and the script sold by the government of various kinds, amount to an implied contract between the government and the grantee, that the latter shall have at least the first opportunity of locating his claim upon any of the vacant lands of the Republic. From the reasons above stated, that it was impossible for locations to be made, owing to the unsettled state of the country, this implied stipulation has been violated on the part of the government, by its having contracted away the most valuable lands before an opportunity was offered claimants of locating them. It is by no means held that the government should not make grants as they have heretofore, but there is a very material distinction between this and an entire preclusion to the holders of claims from locating the lands that now are, or are likely to be, valuable for a considerable length of time. The lands in this country constitute the principal wealth of most of its inhabitants; upon the value of them they have founded their hopes of success. The government of this country has encouraged this hope, and it would, therefore, be the greatest injustice for it now to preclude emigrants from the United States from locating their claims on our frontiers; to give these lands to crowds of foreigners, who never shared in our struggle for independence, and who come to this country from mercenary motives only, and send our own citizens to the Comanche and buffalo ranges to select lands, after they have waited for years to perfect and enjoy their claims, in the confident belief that the government would act towards them in good faith. Every Texian now within our borders feels a greater interest in this country than the foreigners to be introduced under these contracts can possibly be brought to feel, and future events may prove that the best policy of our government would have been not to have lessened this feeling by giving to foreigners the reward due to our countrymen and they who have proved themselves our friends in the hour of need. It is furthermore believed that contracts of this kind are monopolies, within the meaning of the Constitution, and if so, did they not even prejudice the rights of claimants under this government, they are illegal.

"The contractors may sell the benefits of their contract to monied capitalists in Europe, who, for trifling considerations,—the transportation of the emigrants to this country, for instance,—can purchase the emigrants' lands, and thus the principal object of the government in granting these lands, which was to secure a home to the emigrant, would at once be frustrated; the wealthy speculator would monopolize the lands and receive the benefits of the benevolent object of the grant, and the emigrant would either be held by them in a kind of vassalage or slavery, or they would wander without a home, dependent upon the charity of our citizens. The evils incident to these laws, and the contracts made under them, should be remedied as far as possible. The repeal of the laws would prevent other contracts of a

similar nature from being entered into, and the longer existence of them will render every acre of vacant land in the Republic liable to be monopolized. But if this system of contracting away vacant lands is considered politic, a law should be passed limiting the time within which the holders of land script warrants, headright certificates, etc., should locate their claims."

Signed by Col. Ward, present Commissioner of the Land Office, and dated November, 1843.

That brought the attention of Congress to the subject, and I presume had an influence in causing them to repeal the law, which they did during that session (1843–44), by an act entitled "An act to repeal all laws now in force authorizing the President to form colonization contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with." This act it appears was passed by a constitutional majority on the thirtieth of January, 1844. At that time one Charles Fenton Mercer was in the town of Washington, soliciting Congress to give him a contract, with large privileges, embracing millions of acres. Congress seeing the deleterious effects of the system, repealed the laws authorizing it by a large majority. The President vetoed the act, and sent it back, and while it was in progress of being passed over the veto, I think on the very day of its passage, this Mr. Charles Fenton Mercer concluded his contract. This, as I conceive, was an express violation of the will of the people, and committing a fraud upon them.

Now, sir, the majority of the committee have reported in favor of suspending all these contracts without exception. And if this provision is adopted, it will operate no injustice whatever to the contractors; it is the line of safe precedent; it will be both just and expedient. And I contend that the only rule by which we should be guided, is the public welfare. Sir, in pursuing this course, we shall but pass an act similar in its character to that adopted by our former convention. The Congress of 1837, in the general law, entitled "An act to reduce into one act and to amend the several acts relating to the establishment of a General Land Office," provided or declared (§26) that all empresarios' contracts having ceased on the day of the declaration of independence, all the vacant lands of Texas were the property of this Republic, and subject alone to the disposition of the government of the same.

I have heard much declamation here about vested rights, about the impropriety and illegality of interfering with vested rights. But here Congress, by one sweeping clause, suspended all these contracts, and I have never heard of one single murmur or complaint on the part of the empresarios. They have brought suits against the Republic. In some they have recovered, and others are still pending. Even if the new colonization contracts have created vested rights, I would have them preserved. But I only regard with sympathy the rights of the settlers—those of the contractors I regard only as vested wrongs. These recent contracts were conceived in fraud, and carried on in fraud. They were made with the sovereign authority of Texas, and

ought to be subject to all contingencies; and that sovereign authority, whenever it finds it necessary to change the form of government, or expedient to repeal such contracts, has certainly the right to do so. We have provided that private property can be taken for the public benefit in making compensation therefor. These contracts may, then, be suspended, provided adequate compensation be made therefor. The contractors cannot then complain that we are interfering with their vested rights, since we make ample provision for an indemnity.

I am in favor of suspending these contracts, because they are all forfeited. None of the contractors have introduced the stipulated number of families, nor have any of them afforded protection to the frontier—the inducement presented to Congress for making the law. At that time the frontier was infested with Indians, war was threatened with Mexico, and the prospect of annexation was gloomy. It was thought that, by authorizing these contracts, adequate protection would be afforded to the frontier. But this expectation was not realized.

Another reason which I have is, that it would be a mere act of justice to the soldier, and all those who encountered the perils of our revolution. The first and most sacred pledge on the part of the government was that which gave the lands to the soldiers after the revolution of 1836. The Republic had then no money to give, and she did promise to give them all that was in her power, to-wit, lands. I would vote, therefore, to suspend these contracts, because they interfere with this first and most sacred pledge.

I will also vote to suspend them, because by so doing we shall increase the residue of the public domain left for the payment of our public debt. This is another cogent reason for me to pursue this course.

I am aware that it will be argued by the opponents of this measure that the Senate or Congress of the United States may urge this section as an objection to the acceptance of our Constitution; that they may regard it as interfering with vested rights. But I cannot see what right the Congress of the United States can have to interfere in this matter. The joint resolutions leave to Texas the exclusive control of her public domain. If we retain the public lands, we retain the right of exercising sovereignty over them; and the United States has no right to interfere with or dictate our action. It is a matter which pertains exclusively and solely to Texas; it is a matter relative to her domestic concerns. And if, with an honest view of liquidating her public debt, she suspends these contracts, and throws open these lands to location, she is but doing an act of justice, which will remain a bright and not a dark spot on our national escutheon.

I am not one of those who apprehend the great danger which some anticipate in connection with abolition. Yet from statements which have been made by members of this convention, I think there is reason to believe there may be some danger from this cause, unless these large contracts are suspended. I have referred to the law authorizing the introduction of ten thousand families by any one contractor within

the time limited. There may be danger from this source. Within the eight or nine months before the adoption of our Constitution, five or six thousand votes may be thus introduced into the western country, and then this may be no chimera floating before our eyes.

I have stated my belief that all these contracts have been forfeited. Such I honestly believe to be the fact. I would call upon the gentlemen here from every part of the country to say if it is not so. I call upon the gentleman from Travis to say if the contract of Miller & Fisher has not been forfeited. I ask the gentleman from Refugio if it is not the case with the colony upon the bank of the Rio Grande; and I ask the gentleman from Fannin, whether the large contract made with Peters and others is not forfeited; whether they have not failed to comply with the terms of the contract. I am aware that they have introduced a larger number of families than any other contractor; but when the terms are strictly examined, the gentlemen themselves cannot deny that the contract is forfeited.

It may be that in pursuing this course the convention will assume judicial powers. The former convention canceled the grant to John T. Mason, and we have adopted a similar clause; and I hold that we are fully competent to do so. We can create and delegate judicial authority, and if we can do this, we can exercise it ourselves.

These are briefly the reasons which have induced the majority of the committee to report the section, and actuate me in supporting it. I would ask these gentlemen who come from the proper sections of the country to answer the interrogatories I have proposed, and state from their knowledge of the facts whether these colonies are not all forfeited.

Mr. DAVIS said: Annexation is about to take place, and a flood of emigration will pour into the country. The government does not give any bounty land to settlers. The contractors hold out the inducement of a certain quantity of land, and the number of inhabitants which they have agreed to introduce will settle in the country without any exertion upon their part. Now, sir, is this carrying out the intention of these contracts? No, sir; it was intended and expected that the settlers in these colonies should come to the country at the instance of the contractors; that the contractors themselves should be the moving cause of their emigration. And, sir, I contend, and I believe, that any court of justice will determine that an accession of individuals coming of their own accord, is not a compliance with the conditions of the contract. And I do not believe, sir, that this course would be doing the contractors so great injustice as some gentlemen seem to think. To suspend the operation of their contracts, would give then the benefit of them to the present time, and give the settler the benefit of their settlement upon them. Sir, I think we should take into consideration the policy of the country; and I will ask this convention if it is the policy of the country to allow foreigners to make fortunes by speculating in the lands of Texas; men, who, as the gentleman from Nacogdoches well remarked, have never raised an arm in the defense of the country, or spent a

cent to advance its interests. Some of these same individuals, sir, who claim the whole broad side of the country, have recently taken the stump against annexation, and exerted themselves to the utmost extent of their ability to defeat this great and important measure, upon which the interest of the country depends. And these are the individuals whom we must not touch. We are told that we have made a contract with them, and we must carry it out; although they make stump speeches against annexation, and denounce Texas at every corner, still the weight of a finger must not be laid upon them. I do not pretend to know the character of all these contracts; but I know something of one of them; and I do not believe it will be doing any injustice to the individuals concerned to make a brief statement of the facts. It will be recollected that one of these contracts, which embraced the finest and largest tract of land upon the Trinity river, was made by Charles Fenton Mercer. How was it obtained, sir? I cast no censure upon any individual with whom it was made; I think, in all probability, an imposition was practiced upon him by Mr. Mercer, for I know that he did practice fraud at the time he obtained the contract. He appeared at Washington at the time of the session of Congress, and said that his business there was to get an extension of time for Peters' contract. What were the reasons he urged? He said that in the treaty between this government and the Comanche Indians, the Republic had stipulated that no settlements should be made in a certain portion of the country which he represented to be included within that contract. He said that justice required that the time should be extended, at least so long as settlements were prevented in consequence of the treaty. At that same session of Congress a law was passed repealing the law authorizing these contracts, and prohibiting any further extension of time being given in any of the contracts. During the time of its passage, and between the time at which the bill was sent to the executive for his sanction, and at the time at which it was returned with his veto, a new contract was made with Mr. Mercer. And what was the character of that contract? Was it an extension of time to Peters? No, sir. It was a contract granting him the whole broadside of a country. Did he not know it was in opposition to the will of the people of Texas, so expressed by Congress at the time? He obtained the contract under these circumstances, professing that he was only seeking an act of justice in the extension of Peters' contract. That was not all. With this contract in his pocket, and without communicating the fact to any member of Congress, he requested to be heard upon that subject, and the reasons which he advanced were those I have mentioned. At the very time he was urging these claims he was practicing this fraud, for I pronounce it a gross fraud upon Congress. He had at this very time a contract in his pocket by which the fairest portion almost of the upper Trinity was granted to him. I will ask, sir, if this man could have believed anything else but that the people of Texas at the first opportunity would annul that contract. He must have known it. I do not pretend to say under what circum-

stances others of these contracts were made, but I do pretend to say that this was made under such circumstances as to give this Convention the right to say that it is null and void—not because it was unconstitutional, not because it conflicts with any other claims, but because it originated in fraud, which made it not only voidable, but void *ab initio*, and all that is necessary is for this Convention so to declare it.

I know, sir, that in all probability I have detained the House longer than I should have done.

Mr. Runnel's offered the following amendment to Mr. Mayfield's amendment:

Strike out "the final action of the United States Congress upon this Constitution," and insert "the time of the adoption of this Constitution by the people of Texas," and strike out the words "secured or," in the tenth line.

Mr. LOVE said: I shall not attempt to enter into any argument, but simply express my own views in relation to these contracts. It is not necessary now to go back to the manner in which they originated. The only question before us now is, what we are to do with them? I believe that in justice and right they ought to be annulled; but, at the same time, I have a great objection, upon the grounds both of principle and expediency, to voting for an interference with any rights actually vested, whether rightfully or wrongfully obtained. I am more favorably inclined towards the proposition of the gentleman from Nacogdoches, to prohibit any future extension of time, and give the contractors no claims whatever further than we are compelled. And I would much prefer suing them to giving them the power to sue us. I do not believe that any of these contracts have been complied with according to law, nor do I believe that any one of them was granted according to law. The only question to be decided, it seems to me, is whether we prefer to annul them absolutely, or to take the alternative offered by the gentleman from Nacogdoches. I will at the proper time offer an amendment which I think will strike at the root of the evil.

[Mr. Love here read the amendment which he proposed to offer.]

Mr. WRIGHT said: None of the propositions which I have seen upon this subject entirely meet my own views, and I believe that every one has the right to have and express his own peculiar notions. The matter is, that we have gotten into a scrape by misfortune or folly, and now we are laboring to get out of it. The objects which induced the government in the first place to enter into these contracts, have failed to be attained. All parties are willing to concede that much. The great object on the part of the government was to secure the frontier settlements from the continual marauding incursions of the Indians and Mexicans. In order to effect that, the government entered into contracts with these individuals, giving them unlimited powers, unprecedented as it was, for the introduction of settlers, who might meet and successfully repel any attacks upon the frontier. Now, I would ask gentlemen who are advocating an exten-

sion of time upon these contracts, whether these individuals have ever taken the first step to secure the government the protection contemplated in the origin and creation of these contracts. Then, sir, in proportion to the exertions made by these parties, in good faith, to carry out the end and aim of these contracts, is the government of Texas bound to compliance upon her part, and no further. If they have gone to considerable expense—if they have made use of means and exerted themselves in other ways, to accomplish the object, and have made the result visible in the community, then they are to receive that much as a credit upon their part of the performance. Some gentlemen seem to know nothing about these contracts, except the law which created them. There is one of them in particular, sir, which I have made it an object to inquire into, and I think that one may serve as a sample to them all. That is the one last made, which has been alluded to by the gentleman from Liberty. The circumstances under which it was made were very peculiar. And if the party ever attempted to benefit the government in any way at all by the obligations imposed by virtue of the contract, I have never yet been able to learn it. That contract, sir, appears to me to have been made in violation of the law under which it purports to have emanated; and if so, it had no force from the beginning In these contracts, in the first place, they have to set down in round numbers the number of families they design to introduce, then they have to bind themselves to introduce such a number in a certain proportion each and every year from the date stipulated until the number is completed. In the next place, they have to set down the metes and bounds of their colony, and to mark its lines, so that the common surveyors of the country cannot come into conflict with the rights of citizens accruing under the contract. Then, if we find that they have totally failed even to attempt, much less to perform, any one of these things, the government is certainly not bound to fulfill her part. It will be found, upon examination, that in the contract to which I have alluded the very first principle is violated. The number of families is not set down at all, and the only way to arrive at the number contemplated is by calculating the number of alternate sections contained within the bounds of the colony. You will find, again, that the metes and bounds bring the colony into direct conflict with the Cherokee territory, which was specially reserved. Under these circumstances, the government is of course under no obligation whatever to give these contractors any extension of time, or to grant them any exclusive privileges to the prejudice of her own citizens. The question, then, arises, is it expedient for this convention to do justice to the great mass of the community in Texas? Which of the parties has the greatest claims? Shall we chiefly consider the rights of the citizens, who have fought for the country, and maintained it from the beginning, or those of these speculators who have never dared to place their feet upon the frontier, and have never raised a hand but in contradiction of her best interests? Are we to consult the convenience of one or two individuals, or that of the whole people

of Texas? Where do these gentlemen reside? Who are they? Are their rights and interests identified with ours? No, sir. Then I hold the principle that we are bound to protect ourselves first. It is the duty of this convention to consult the convenience and interests of the people of Texas; and it is upon this principle that we have to act upon these contracts. So far as they have been complied with, exceptions should be made. So far as the contractors have acquired rights, and so far as they can make that fact appear before the courts of the convention, those rights should be secured, and no further. I am willing to give them all that they are entitled to; but I am not willing to extend them any favor when they have taken no steps to carry out their contracts. Some allusion has been made to the probable situation of a portion of the country, in consequence of annulling these contracts and opening the lands to surveys.

Sir, I hold it as a principle that we are bound to pay our debts, however contracted, when we have the power so to do. So far as the rights of citizens are to be endangered, my opinion is this: I do not conceive that it will have any material effect upon those who occupied a portion of that country before these contracts were made. Those who have lived upon the frontier about thirty years have lived there too long by about twenty-five, I think. That section of the country was very much annoyed previously to the passage of the law authorizing these contracts. From 1838 to 1841, the northern frontier was one continued scene of bloodshed and warfare. The counties of Lamar and Fannin were entirely laid waste and desolate, and just at the time when the last settlement in Fannin county was about being abandoned by Capt. Baily Inglish and his associates, and perhaps forever, Major Jonathan Bird came to the rescue and saved the people. He then advanced about ninety miles to a point upon the west fork of the Trinity, and there maintained his post, thus giving entire security to the settlements in Fannin county. Major Bird was at his post, with about twenty men and a considerable number of families, when he was ordered off and driven away by the agents of Peters' colony, who then gave him the first intelligence he had of the existence of such a contract. Since that time these persons have changed their course; but they have not satisfied my mind with regard to the illiberality with which they treated these poor fellows, who have never asked or received a dollar for the services they rendered upon that particular occasion.

I am as willing to give the emigrants their rights as to give the old settlers theirs. I am not desirous of sacrificing the rights of any. We can guard the rights of all, and extend mutual benefits to all alike. And if any one should attempt to interfere with the rights of others, we can give them a law to which they may appeal. I am willing to give these people every foot of land they have earned, and to throw in a little more. As to the colony to which I have referred, I contend that it has no claims upon us whatever. No man here will say that contract was made originally in conformity with justice or equity. Let us examine for a moment the circumstances under which

this contract was entered into with Charles Fenton Mercer. We find him here at the Eighth Congress, supplicating for the contract; and see the privilege allowed to Gen. Mercer. He was permitted to appear before Congress and advocate the principles set forth in his contract. And what did that Congress do? They rejected all of his demands with disdain. As nearly as I can recollect, the vote stood 33 to 6. He then sought the President, to see if he could not meet with better success in that quarter; and the Congress seeing what he was up to, introduced a law repealing all laws upon that subject, which passed both the House of Representatives and the Senate, and was sent to the President on or about the twenty-second day of January, 1844, for his approval, and about the twenty-seventh of the same month he sent it back to the House with his veto. Upon the twenty-eighth the House passed it over the veto by a vote of 34 to 5, and sent the bill and veto to the Senate upon the twenty-ninth. And upon that same day, to the astonishment of all his friends, he signed, sealed and delivered this instrument called a contract into the hands of Charles Fenton Mercer, and that, too, with a perfect knowledge of all the facts, well knowing at the same time what would be the action of the Senate upon the law under consideration. And upon the thirtieth day of the same month the Senate did pass the law over the veto of 8 to 3. Thus this contract was made under very suspicious circumstances, to say the least. This is enough to kill it of itself; the presumption of fraud is too strong for it ever to be tolerated by the people here. Then, I say, it is the duty of this convention to arrest this foul attempt to impose upon the people of Texas; to declare this contract a nullity in itself, as it always was, and open this country, thus attempted to be wrapped up in mystery and fraud, for the honest payment of the debts of Texas. This one is an exception; there is no right in it; it deserves the execration of this body.

Mr. Mayfield accepted the amendment offered by Mr. Runnels.

Mr. EVERTS said: Being called upon, as I imperiously am, to say something upon the subject of the colony contracts of this Republic, I will endeavor to give my reasons, in a very brief manner, why I cannot vote for the proposition now before the House; that is to suspend, or, in other words, to amend and set aside, the various colonization contracts of this Republic. Of the precise provisions and details of the various contracts, I am not empowered except as to one—that is the contract made with Peters and his associates; neither is it necessary here to discuss the merits of those contracts. Nor, Mr. President, is it necessary to, nor shall I, say much upon the policy of granting them in the first place. Congress, in the year 1841, passed an act which authorized the President, then Sam Houston, to make a colony contract with Peters and others. In the year '42, this law, by another act, was made general, giving the President power and authority to make as many colony contracts as he might deem proper and advantageous. In 1843, a law was passed by the Congress of this Republic granting further time to Peters, etc., to comply with the conditions of his contract, and during the same year that contract was modified, and

new and different conditions were agreed upon, and entered into by the contracting parties. About this time the government entered into a contract with Charles F. Mercer, when the law authorizing such contracts to be made in future, was repealed. All this legislation upon the subject, through successive sessions of the Congress, is strong evidence to every mind that the policy was deemed good, and that there was a necessity for its adoption in order to people this country, and induce emigration to it.

I could draw, were I permitted, a distinction between the policy and propriety of entering into the various contracts. Peters' was the first one made, and that company had expended large sums of money in attempting to comply with the conditions imposed, they had introduced a large number of families, and in some measure given protection and quiet to the frontier, when the law was repealed, authorizing grants of this kind to be made. The Mercer contract was made after the Legislature had repealed this law, but before the repeal was approved by the President; so it would appear that the necessity and the policy of entering into the Mercer contract, were deemed by the Congress not to exist at the time. And were I to express an opinion, I should say that there was no necessity for this last grant to be made, as the time had gone by, and Texas was in a condition not to hold out such immense inducements and bounty to emigrants. So much for the policy.

It is said, sir, that these contracts are all unconstitutional, and therefore this body ought to annul them.

So far as I have examined the subject, I cannot perceive the force of this assertion. I hold, Mr. President, that by the revolution and the independence of Texas, all the unappropriated lands within her limits became the property of, and the title vested in, the government of Texas. If this be true, had not the government a right to dispose of it in any manner it might think proper and advantageous? Do gentlemen, or can they, draw any sensible or constitutional difference between giving 640 acres to an emigrant simply because he emigrated to Texas within a given period, and giving the same amount upon the conditions of the colony contracts? I really cannot perceive any difference; both modes are bounties, and inducements held out to the world that Texas will give to the settler upon her public land 640 acres. It is not pretended, from any quarter, that the 640 headright grants are unconstitutional. And why? Because the unappropriated lands belong to the government, and it has a right to dispose of it in any manner thought proper. It is said that about 400 leagues of land have been granted to the different counties for the support of schools and colleges. Are these grants unconstitutional? Are they all null and void? No one can pretend, for a moment, that they are. But it is said that they are monopoly, and therefore unconstitutional, inasmuch as monopolies are prohibited by the Constitution of this Republic.

To this assertion, I would reply that the law under which the President made the colony contracts is general in its character—it is not

exclusive. It authorizes him to make as many such contracts as he pleases. Under this law, some four or five colony contracts were made with different individuals, and of different nations. There is no exclusiveness about it.

A monopoly, if I understand the term, is the granting a privilege to a particular individual or company, which is prohibited to all others. But, sir, a law which gives the right to all alike, to partake of its benefits by complying with its conditions, can never be deemed exclusive in character, although but few may partake of its benefits. Such, I take it, is the character of the colony laws; and if so, those contracts are no monopolies.

But, sir, suppose that I am wrong in all the positions and arguments advanced, I would ask if this body is the proper tribunal to pronounce judgment upon these contracts. I do not believe this convention was called for that purpose. And I ask if it would not be acting in bad faith to annul and suspend these contracts in this *ex parte* manner. These contracts have been at various times solemnly entered into, whether they are fraudulent in their character, or unconstitutional or not. This, sir, is not the place to try those questions.

Let the whole of the questions involved in the subject be referred to the courts of justice; let the parties be summoned into the halls of justice; and if, upon a rigid inquiry, it shall be found that these contracts are unconstitutional, let the courts pronounce them at an end, and declare them forfeited. If, sir, the contractors have not complied with the subsequent conditions of their contracts, they must, by the very terms of them, be declared to be at an end.

But, sir, a court is the proper place to make this investigation. Sir, I would not, for another and stronger reason than any other, declare these contracts at an end. Texas is now attempting to form a Constitution, which is to be republican in its character, in order to be admitted into the American Union as one of the States of that confederacy. And the instrument which we frame here must, in all respects, be consistent with the Constitution of the United States. That instrument and the treaties and acts of Congress made in pursuance thereof, will be the supreme law of the land, the Constitution of any State, or act of any State Legislature, to the contrary notwithstanding. That instrument declares that no State shall pass any law impairing the validity or obligation of a contract. Would not the suspension of these colony contracts by this body, *ex parte*, be an act directly conflicting with those provisions of the United States Constitution? I solemnly declare that I believe it would. Insert this suspension clause into our Constitution, and, sir, I fear all our labors here would be in vain, and annexation an idle dream. Would not the Congress of the United States reject our Constitution, and justly too? You would give to the enemies of annexation the advantage (and the party opposed to our admission into the Union is a powerful one, although not in power now), and you would place the friends of the measure in a condition to compel them to vote against the acceptance of our Constitution; the consequence would be, Mr. President, the postponement

of our admission into the Union, if not an entire defeat of the whole measure.

Therefore, I repeat again, let this whole subject of colony contracts be referred to the proper tribunals of the country, and I have the fullest confidence that entire justice will be done in the premises.

[Mr. Darnell in the chair.]

Mr. President RUSK spoke as follows: I cannot agree with the gentleman who has just taken his seat, that this contract stands upon high ground. If he had said that it covers a vast deal of ground, I would cheerfully agree with him. I shall myself, if compelled to vote, vote against the section as now presented, but upon very different grounds from those of the gentleman from Fannin.

These contracts, I believe, were unconstitutional in their inception. The law which was passed authorizing them to be made was unconstitutional on various grounds. In the first place, if I understand the true monopoly, it was giving to a few individuals, not residents of the country—individuals who had not mingled in the strifes and shared the sufferings and perils of the revolution, who had never struck a single blow to redeem our lands from the foe—a large monopoly in the country. Our land system is peculiar. At one time our all was in jeopardy. There was a time when we needed the assistance of every strong arm which we could command, for the purpose of wresting from the hands of the tyrannical Mexicans the titles to these very lands. At that time the Consultation, by the strongest guaranties of which the English language is capable, promised to those who should come then to the country when their aid was needed, and render proper service, the right to locate any vacant and unappropriated lands in Texas. This right was then strongly guaranteed by the Constitution. Then those who emigrated here in the hour of peril, darkness and despair, are clearly entitled to the location of their headrights. Those who took up arms and mingled in the strife are entitled to the location of their bounty warrants. There was a strong guaranty given in the Constitution, and in all the laws afterwards passed on the subject, that they should have the entire territory of the Republic to select from. Then this strikes my mind as being an obligation which future speculation by no means could destroy. The government further guaranteed to the representatives of these noble spirits who fell under Fannin and Travis the right to locate a certain amount of the lands which their husbands and fathers had earned in their last dying struggle for freedom. This law, then, not only authorizes a monopoly, but granted away a right which the Convention and the people had guaranteed to others. It was contrary to the spirit and genius of our institutions, and I am satisfied that whenever these contracts come before any judicial tribunal, and all the laws bearing upon them are investigated, they will be declared absolutely null and void, as in direct contradiction to constitutional provisions of the Republic of Texas.

These gentlemen, says the gentleman from Fannin, have rendered the country important services. In what field, sir? Where, let me

ask? When have their voices been heard in the councils of the country in her darkest moments? Where have they borne arms in her defense? The voices of some of them have been heard in Texas. They have been heard in the United States, crying out against the very measure which, to my mind, guarantees the unmolested enjoyment of all their rights to those who have fought the battles of their country, and served her in her darkest days—our annexation to the United States. And do they deserve our kind and fostering care? Shall we, from motives of policy, turn off the soldier who has fought and the heirs of those who have fallen for the redemption of the country? Shall we say to them, we must reserve these lands not for the actual settler, for he is protected? And I here solemnly enter my protest against the amalgamation of the actual settler with that of the foreign speculator who is endeavoring to make a fortune out of these emigrants. The settlers are citizens of the country. They are here for weal or woe. They have their rights guaranteed to them by this very section itself, and shall have in any article which I will vote for upon this subject. I protest also against the idea that we have ever attempted to curtail the rights of those who came but yesterday. Such arguments as these are totally useless. They have no foundation in the opinion of the people of Texas, nor in the acts of their deliberative bodies, or of this Convention itself. Then there are no parties here but the government of Texas on one side, and the contractors on the other, and I shall go just as far as I think we can go with a proper respect to our ourselves.

I shall vote against the twenty-first section, because, if these contracts are constitutional, this Convention may have the power, but I deny the right, to interfere with a single vested right. That contains a sort of admission that they are in accordance with law.

And I take this broad ground, that when this Constitution goes before the Congress of the United States, that body may imagine that we are here destroying legal and vested rights. If they should believe that, it is competent for them, and it would be their duty, to reject it. The gentleman from Robertson referred us to our Constitution of the Republic of Texas. Sir, that Constitution was made under very different circumstances from this. We are making here a State Constitution. We have acknowledged the supremacy of the Constitution of the United States of America. We are going into that confederacy, and therefore give them the entire right of making our Constitution. In this Constitution is an article which says that no State shall pass any law impairing the obligation of a contract. And I would be unwilling, however bold I might be, when we could reach the object by a different route, to run a tilt against the Constitution of the United States.

Again, it is a principle of law, as has been stated here, that if we put it out of the power of the contractor to comply with his contract, the obligation rests upon us to comply with that contract to the letter. It is not only a principle of law, as held in the celebrated Aredondo case in Florida, which went up to the Supreme Court of the United

States, but it is a fundamental principle running through all contracts.

Then, sir, this twenty-first section might involve us in many difficulties, and, under the circumstances, I shall feel myself bound to vote against it. I have, with the assistance of other gentlemen, drawn up a section which I propose to offer as a substitute.

Mr. Rusk offered the following as a substitute for the twenty first section:

WHEREAS, It is believed that the colonization contracts heretofore entered into by the President of Texas, as well as the laws authorizing said contracts, assigning large tracts of country to certain individuals for the purpose of colonization, were unconstitutional, and calculated in their operations to deprive the citizens of Texas of their just rights, and that the terms annexed to them have not been complied with by the contractors:

The Legislature is prohibited from extending any further time to the contractors, or dispensing with any conditions attached to them; and they shall at their first session pass such laws as may be necessary to institute judicial investigations for the purpose of inquiring into and annulling said contracts: *Provided*, They are proven to be illegal and void: *Provided*, The actual settlers already in said colonies shall be guaranteed in their just rights to their quantum of land as settlers.

Mr. Mayfield offered the following amendment to the twenty-first section:

Strike out, "but the rights to land of actual settlers already introduced in conformity with the terms of the contract are hereby guaranteed," and insert, "*Provided, always*, That any actual colonist who shall be residing within the limits of any of the said several colonies at the final action of the United States Congress upon this Constitution, and shall be engaged in the cultivation of the soil, or any of the mechanic arts, shall be entitled to the lands secured or attempted to be secured to him, her or them, by virtue of said colonization laws or contracts."

Mr. VAN ZANDT said: I will submit a few remarks, Mr. President, expressing the views which I entertain upon this subject, and giving my reasons for the vote which I shall give. I look upon the question before us as one in the consideration of which we should be governed chiefly by our nation's policy. I do not conceive it necessary here to inquire whether these contracts were originally constitutional or not. Nor do I think it necessary to proceed in the language of the substitute offered by the gentleman from Nacogdoches to declare our opinion that they are unconstitutional. I was much gratified by the opening remarks of the gentleman from Nacogdoches, but I regret exceedingly the conclusion at which he arrived. I prefer, so far as I am concerned, that the Convention shall adjourn and suffer things to remain as they are rather than adopt this substitute. I believe that, in the latter event, we shall not only fail to reach the object contemplated, but, on the contrary, injure both the country and the

contractors themselves. What would be the effect of this section, if adopted? It would be this, sir:, It proceeds, first, to give it as the opinion of this Convention that these contracts are unconstitutional and void. Now, what effect will that have upon the settlers in the first place, those who have already been introduced? At once it will render them dissatisfied, because it would devolve upon future legislation to say whether their claims shall be ratified or not. The effect upon future emigration will be to hang up all that portion of country. It prohibits not only surveys, but the introduction of other settlers. I do not believe, sir, that we should declare these contracts unconstitutional without giving the parties interested an opportunity of being heard. If this course is adopted, what inducements can the contractors offer hereafter in bringing in settlers? In vain may they point to the statute book if the Constitution has pronounced them unconstitutional. And thus a large portion of the country will be shut out both from surveys and location. I therefore object to the whole preamble as entirely independent of the section, and ill-becoming in the Convention to adopt. I do not believe that at this time we have either the opportunity or the means necessary to a full investigation of these contracts, so as to say whether they are unconstitutional or not, or whether the contractors have complied in good faith with their contracts as originally entered into. If we had them before us, it might become us to give an opinion of this character. But, under the circumstances, it is impossible for us to pronounce such a verdict. If called upon at this time to give a vote connected with a denunciation of these contracts as unconstitutional, I must decline giving it. I shall determine this question in one mode only: I regard it as a question of policy. What was the original object in view in authorizing these contracts? Our frontier was exposed to the inroads of the merciless savage; husbandmen were frequently called from their homes and their crops to defend themselves and the adjacent country. The country was desolated, the population was receding, and that region which, a short time before, was in a flourishing condition, and bade fair to rival any portion of the country in actual prosperity and wealth, was soon to become a desolate wilderness. At this moment these individuals came forward, and offered to contract for the introduction of a certain number of families upon the exposed frontier, sufficient to give protection to the old settlers. I was in Congress when the law passed, and the question of constitutionality, so far as I recollect, was not even agitated. The only question then considered was one of policy. Is it policy to make it the interest of these individuals to introduce these settlers to stand there as a breastwork for the exposed settlements of the country? This was the question, and the only one. Now the question arises, has this object been attained? If I am rightly informed, it has not. So far as the western contracts are concerned, I understand that the emigrants brought from foreign countries here, instead of being divided over the whole country, have been placed in one or two spots, in squads or villages, so as to afford no sort of protection to the frontier. As to the other contractors, I

am told that they have introduced scarcely a single settler from any foreign country. It is true they have traversed the United States, and perhaps Europe, but I am informed that perhaps two-thirds of the colonists are men who came here at their own charge, and of their own free will, and not on account of any inducements held out to them by the contractors. I understand that some of them were actual settlers here before. The gentleman from Fannin has very ingeniously read a certificate of the Secretary of State, to show that a certain contract has been complied with. I will read the certificate.

[Here Mr. Van Zandt read the certificate referred to.]

Now, sir, does this come here as the certificate of the Secretary of State that these contracts have been complied with? No, sir; but two individuals, acting on behalf of the colonists, have certified this to the Secretary of State. Now, sir, does this prove that the Convention is called upon to act upon it and change its course, a course in my judgment called for by a regard to the welfare and safety of the country? I say that if this proves anything at all, it only proves that the contractors themselves say that they have done so and so. I hold then, sir, that these gentlemen, so far as the evidence before us is concerned, have not shown this Convention, nor has it been attempted to be shown, that the contractors have complied in good faith with their contracts. But I say, sir, that I do not conceive this matter pertinent to the issue. I admit the position contended for by gentlemen, that if these contracts were originally binding, and by the act of this Convention they are annulled or suspended, so as to prevent a compliance with them on the part of the contractors, they will be entitled to the premium lands claimed by them under the contract. I admit the position to the full extent, that if we prevent their compliance with the terms of their contracts, we are bound to pay them an indemnity; and if the courts declare that these contracts were constitutional and have been complied with in good faith, I am willing that they should have every acre which they can claim. I believe that the country would be benefited by giving them all their premium lands, and suspending the contracts in future. But I am unwilling, if anything else can be adopted which will suit the case, to go that far. I believe that, under the circumstances, it would be sufficient to require these gentlemen to resort to the courts, and there prove before a jury that they have attempted to comply in good faith with their contracts; and I believe, if successful, they should be amply compensated, and no injustice done. So far as that is concerned, we can provide ways and means by which these gentlemen may have ample justice done them. I believe that, whether constitutional or not, these contracts were wholly inexpedient. They have failed to accomplish their ends, and through them great injustice has been done to a certain class in this country. I allude to that class of men who came here at an early period, and participated in our early struggles, at a time when our fate and destiny were not told. They came then, with the bold heart and ready arm to do battle in the cause of liberty and civil rights. They came here and breasted the storm when at its

height; and they are surely entitled to their reward. The government held out to them certain inducements, promising to give them a certain quantity of land on account of their emigration to the country, and a certain other quantity for actual personal services rendered in its defense. Then, if there is any contract existing, I hold that to be a contract as constitutional and legal as any which the government has entered into; and so far as the settlers are concerned, it is one which has been complied with and fully executed. I am unwilling to say to these revolutionary heroes of '36, you must go to the Rocky mountains before you shall have your lands, you shall not locate them near the settlements where the lands are valuable. I say, sir, that they have as much right as Peters and others, and a better; and believing that they have a better right, I am for giving them the precedence. I believe that injustice has been done them; and I believe it is the duty of this Convention to right the wrongs by others done. The objection has been taken, that if we adopt this section, we shall jeopardize the acceptance of our Constitution by the Congress of the United States. I apprehend no such consequence. Suppose it should be said there that we have attempted to interfere with vested rights. The amendment of the gentleman from Fayette provides that all those colonists who shall be here at the time of the adoption of our Constitution shall have their rights guaranteed to them. It will be provided also that the contractors who have claims against the government for their premium lands, shall have the right to go into the courts of the country, and there before an intelligent and impartial jury establish their claims. What more could they ask?

Mr. DAVIS said: I seems to me, Mr. President, that we have to pursue one of two courses; either to let these contracts remain undisturbed, or to suspend them at once. For that reason I shall oppose the resolution offered by the gentleman from Nacogdoches, which proposes that the Legislature, at its first session, shall pass laws for instituting an inquiry to determine whether these contracts, in the first place, were constitutional, and if constitutional, whether they have been complied with. What, sir, will be the state of the country embraced by these contracts, during the investigation? The settlement of that country must be suspended; no individual can go there to settle in any security; and consequently the occupation of a large and valuable section in all probability will be suspended for years. It seems to me entirely useless to adopt the course suggested by the gentleman from Nacogdoches. It might be before the matter would be determined, and I ask again, what would be the condition of the country in the meantime? I am in favor of the section with the amendment offered by the gentleman from Fayette, and with some little further amendment, which I think should be made. A great deal has been said in relation to the right and power of this Convention to abolish these contracts. A great deal of law has been referred to upon the subject, which is familiar to every man who has even a superficial knowledge of the laws of his country. But, sir, this Convention has powers, and can exercise powers which no common judi-

cial tribunal can take upon itself. A judicial tribunal cannot annul a contract; a Legislature cannot; but this Convention has the power to do it; and if it has the power, it can exercise it; and if it is exercised by this body, I say it is reasonable to suppose that it will be nothing but justice. I will ask, gentlemen, if the people, in their sovereign capacity, have not the right to annul these contracts? I do contend, sir, that we have the right and the power; I will use the term here, *the right*, and, in all probability, upon this occasion we shall exercise that right. But, sir, we propose to go further, and if these contracts are annulled by a solemn act of this Convention, open the courts of the country to the contractors. We propose to permit them to enter the courts, and there investigate the merits and justice of their contracts; and if this Convention shall have done them injustice in suspending them, that the State of Texas shall remedy that injustice. It seems to me that the policy of the country requires the action. Sir, under what circumstances were these contracts made? They were made, sir, at a time when it was deemed important that emigrants should be brought into the country. Well, sir, I am willing to say that those brought into the country by the contractors shall receive some benefit from the contracts, and the contractors some benefit from their settlement. But, sir, what is the case now? It is no longer necessary for the contractors to make any exertions to obtain the number of individuals required of them.

Mr. MAYFIELD said: I have listened attentively, Mr. President, to the debate upon this subject, and I believe that every gentleman upon this floor has come to the conclusion that the objects sought to be attained originally in the creation of these contracts have failed to be reached, and also that the time has arrived when the people of Texas have a full and ample opportunity to speak upon this subject as justice, or right, and as the interest and true policy of the country may dictate. I believe with the gentleman from Nacogdoches, that by virtue of these contracts, the heirs of the soldier, whose bones lie bleaching upon your prairies, are deprived of a privilege they are entitled to enjoy under this government, that of the selection and location of the lands belonging to them. I believe also that he who came to the country at an early day, relying upon the faith and promise of the government, is, by virtue of these contracts, which have not been carried out or attempted to be carried out in good faith, deprived of the right of locating his lands upon a portion of our territory which honesty and true policy entitle him to locate upon. I believe also, sir, that since the year 1841, every movement which has been made upon this subject, and particularly the acts of our government in 1843 in relation to these contracts, has been based upon bad policy, and in some instances upon absolute fraud. I believe further that the time has arrived when the people have the power to check the operation of that policy which has been so deleterious in its effects. I believe that the period has arrived when the people in their majesty and power have the opportunity of checking and putting down a fraud which has been attempted to be perpetrated upon the country; yes,

sir, a grand and stupendous fraud. I hold, too, sir, that the power of this Convention is ample and complete to speak even judicially upon this subject, and I believe in the propriety of such a course.

With regard to the action of the government in relation to these contracts, I would remark that most men in this country, when they speak of the *government*, seem to consider all power as concentrated in the chief magistrate of the state and the cabinet provided for by law. Such has been the sentiment of the people in former times, that the term *government* has been understood to apply exclusively to Sam Houston and his cabinet. But, sir, that day and hour have passed. They no longer constitute the government; the people in their might and majesty constitute it. They, sir, have undertaken the accomplishment of the great measure of annexation, and in the accomplishment of that measure they have called upon their representatives to check the evils brought upon them by that government. The time, then, has arrived in which this country can do justice to that class of her citizens who have contributed the most to maintain her institutions, and at the same time relieve herself from the operation of a policy which can bring nothing but disgrace, poverty and wretchedness upon your state.

This section will arrest the progress of the evil, and prevent the grasping speculator from sapping the foundation of your institutions in his endeavors to become rich at the price of the labor of the honest cultivator of the soil and the *bona fide* emigrant. We only seek by the principle to be incorporated in this section, to cut off these harpies, who neither work nor labor, nor earn an honest living by the sweat of their brows, whose hands have never been trained to any honest employment, and confer the benefits of the state so far as we can upon the real cultivator of the soil. I entertain the sentiment that the first revolutionary patriots of this country were just men; and when, in the Constitution of '36, they declared that certain colonization contracts were in violation of just principles and derogatory to the true policy and interest of the country, and therefore should cease to have effect from and after that time, I look upon them as having been then actuated in some degree by the patriotism which animated them upon the field of battle. I believe they hoped and expected by a declaration of this kind to secure the honest emigrant in his rights, and to rid themselves of the speculators swarming around the halls of legislation of your country. Those men, sir, who had fought from the first origin of the revolution up to that period in defense of their country, and then held themselves in readiness to leave that assembly and again bear their bosoms to the enemy, were the first to put the seal of disapprobation upon schemes of this sort. I hope, therefore, that upon an occasion like this, those who have read the history of the past, and have seen the benefits which have been conferred upon the country by checking those contracts, which at the time occupied the entire territory of Texas, will not now continue the operation of contracts equally as deleterious to the public interest and opposed to true policy.

The objection which I have to the substitute of the gentleman from

Nacogdoches is this—it does not, I think, reach the question. It imposes it upon the government as a duty first to institute suits against these people, who, in the language of the gentleman's substitute, have entered into a contract unconstitutional and impolitic in itself. I desire, for my own part, if such be the state of the facts, to impose upon them the obligation and necessity of filing their bills in equity, and setting forth the allegations upon which they rely. I say, sir, if they are equitably entitled to any indemnity under the terms of this section, let them, as honest men will not object to do, swear to it. But by the provisions of the section as offered by the gentleman from Nacogdoches, or that proposed by the gentleman from Galveston, it is made the duty of the government first to institute suit, and against whom? Against men, sir, or at least some men, who, as all admit, have entered into contracts made in collusion and fraud; I care not whether the fraud has been upon their part or upon that of your government, they have entered into fraudulent contracts. Can we, sir, with propriety, impose upon the people the necessity of instituting suit against men who have been thus guilty of collusion with your government—Sam Houston and his cabinet, though not all of them, I hope? No, sir. If they have entered into these contracts with clean hands, if the parchment under which they claim is without blot or taint of fraud, they will not be endangered by appealing to the independent judiciary of the land; their rights under the provisions of this section will be fully maintained, and the decree of the court will give them all they are equitably entitled to. And they have the advantage in the litigation, though fraud may exist. Because, so soon as they show their own hands clean, then, sir, the principle of law alluded to by the gentleman from Nacogdoches will apply in their behalf, that they shall not be jeopardized or injured by the act of the government; and if it is the government which has acted fraudulently, the courts will be obliged to construe the contract in their favor. Such is the principle of law and justice. They will not be injured, but even the act of fraud itself will thus in some degree inure to their benefit, if unconnected with their own acts.

I desire to see this section pass. I am willing to vote upon this occasion to declare these contracts unconstitutional; and I further wish to secure to the *bona fide* settler and cultivator of the soil all the rights which he would have had if the contracts had been carried out in good faith. By doing this, I think we shall not prejudice the rights of any who are entitled to locate their lands upon the public domain.

I have been informed by surveyors of the country, and I believe the records of the land office will show, that men have been precluded from locating in a portion of the country not occupied by any settlers whatever, but in which only lines had been run and sections laid off under a colonization contract. Now, sir, is it just that those who fought on the plains of San Jacinto, and the heirs and representatives of those who fell at the Alamo and with Fannin, and those whose bones lie unburied at Goliad, should be precluded from locating upon the soil of the country, and that too upon territory merely blazed and

run off, and waiting the introduction of emigrants under these contracts? It seems to me a violation of the public faith, an act of abhorrent injustice. And as an occasion has presented itself, when, as I believe, all the evils connected with these contracts can be remedied without doing injustice to any, and without infringing any principle of international law or justice, I think it is time that the people of Texas should speak out and place this matter beyond cavil or doubt.

I think the cases cited by the gentleman from Nacogdoches and others have no application here under the circumstances. This act on our part is not that of a mere co-ordinate branch of the government, but it is an act of the deputies of the people in Convention assembled, and we refer the subject entirely to the people. It is a kind of adjudication frequently called for by the peculiar circumstances and policy of a country, and one to which so many judicial decisions can apply. In doing this, sir, we shall commit no act of manifest injustice, but shall only perform that which we believe justice and the true policy of the state demand at our hands, in behalf as well of our present population as of those who may follow after them. Unless the Convention act upon the subject in some form or other, what will be the state of things presented? Here will be a vast tract and extent of country which, it seems, is already marked out for the emigrant who has not yet left his home in Europe, held up from the operation of the laws. The Legislature can make no disposition of it for the payment of the public debt, or common schools, or any purpose which the interest or prosperity of the country may dictate. And this is to be the consequence, lest perchance we may be doing injustice—to whom? To men who have entered into contracts in violation of law, of palpable and abstract justice, and of the Constitution of your country, and who are seeking to enrich themselves, and at the expense of whom? At the expense of the country at large; at the expense of the representatives of the deceased soldiers and patriots; at the expense of every honorable and chivalrous sentiment. Sir, the true policy of every state is to secure first the protection of its own citizens, and an equal and proper disposition of lands to those who will devote the labor of their hands to the cultivation of the soil.

Mr. OCHILTREE said: I had intended, upon this occasion, Mr. President, to cast a silent vote without mingling in the discussion. But since the gentleman from Fayette has presented a new issue, every feeling of my own, every principle upon which I act, forbids me to be silent. I am called upon as a juror, without evidence and without law, to pass upon the honesty and proper motives of a man whom I glory in calling friend—Sam Houston. He is directly accused of being a party to a stupendous fraud. And this Convention is called upon, without law and evidence, without the form of trial, to give their verdict and publish it to the world. For this issue I am not prepared. If a fraud has been committed affecting the rights of the people of Texas, I want the case tried, sir. If I have pressed a man to my bosom and called him my friend who could be

guilty of an enormous crime, I want it known. If he has been a party to this great criminal transaction by which the rights of the war-worn soldier have been bartered away, if he has committed an offense which would stamp him as a felon throughout christendom, I want it made to appear in characters so distinct that every man, woman and child may read and pronounce his deep damnation there. This is the issue now presented before this House by the gentleman from Fayette. If he believes that such a fraud has been committed, he is justifiable in making the charge; but if I consider it unfounded, I am also justifiable in repelling it. If Sam Houston is guilty I want it proven; if proven, he is stamped a villain; but if not, he will do as he has often done before, rise triumphant above the petty attacks of his enemies. Sir, if he is tried and convicted, it will not be the first time that he has been tried and convicted by his enemies; but thank God there is a great appellate tribunal which has universally sustained him, which has never yet failed, when appealed to, most triumphantly to vindicate him; and in my opinion, though not a prophet or the son of a prophet, that tribunal will do it again. Yes, sir, if he was the government, if his oracles were heralded forth to the world as the laws of the country, he will soon be the government again, and all the powers which can be brought to bear against him, in my opinion, cannot prevent it. All that I want with regard to this matter is that it should be tried by the judicial tribunals of the country. I am willing to go as far as the farthest in protecting the rights of the citizens and early settlers from trespass. I believe that contract, however, does not prevent any location made before the entrance into the contract. Believing this, I shall vote for the proposition submitted by my colleague from Nacogdoches, although I do not like its features. I do not like its "whereas," or that this Convention should hold a menace over the tribunals which are to adjudicate the rights of individuals, but I will vote for it, believing it the best that will be offered. I want the courts to try and adjudicate these cases; I want them to inquire into the facts, to read the law and hear the evidence. If a fraud has been committed it has not been by General Mercer alone; it is a double fraud. Whenever it shall be so pronounced by the judicial tribunals of the country I will then believe it; I will then acknowledge it, but never until then. Let us not, without law or evidence, and upon mere *ipse dixit* of those who, however honest, are evidently governed in some degree by their predjudices, adjudicate this matter in the Constitution. Let it not be said that this body, selected for intelligence, honesty and patience, and sent here not for the purpose of stamping felony upon the parties concerned in colonization contracts, but for the purpose of forming a just and beneficial organic law, have thus abused the powers delegated them by the people. But let us investigate the subject calmly, and leave the decision of the matter to the courts, where it belongs; let the judges pronounce upon it; let the Legislature be called upon to impose every restriction in future, and be prohibited, if you will, from extending the time of these contracts; let the parties be cited to ap-

pear at the next term of the court immediately following the adjournment of the Legislature, and if they do not appear, let judgment go by default, and let their contracts be pronounced null and void. But I want a fair chance given them to defend themselves. In giving this there is no injustice done to any; it is what I am always willing to accord to friend or foe; and "let justice be done though the heavens fall."

Mr. MAYFIELD said: I think that it is not the issue before this Convention. It was asserted by a gentleman upon this floor that a fraud had been committed upon a certain occasion, but he contended that it had been on the part of Charles Fenton Mercer. If, then, I argued, it was true, as he insisted, that Charles Fenton Mercer had been guilty of a fraud upon the country, whereby a large portion of the public domain was to be wrested from the heirs and descendants of those who had fought as gallantly as Sam Houston upon the battle-field, it was equally true that Sam Houston himself had been a party to it, because he signed the contract, as I understand, conjointly with Charles Fenton Mercer. Then I only draw my conclusions from the statements of a gentleman I believe equally as devoted to Sam Houston, although perhaps not capable of passing as high an eulogy upon that gentleman, as he is himself. Nor, sir, is the position he assumes correct. He indulges in a sophistry which is not just. The true principle is this: Go to the history of the times and of a people; that establishes at all times a fact, sir; it justifies their action upon any great measure which may affect their prosperity or safety. And when the welfare of a people is involved, when the policy of a State is jeopardized, when the rights of the heirs of the war-worn soldier are to be taken from them, then, sir, the concurrent history of the times, the pages of that book which chronicles day by day the actions of your rulers and the administration of the laws, form a volume of testimony, upon which the people are justifiable in acting at any time, without awaiting the slow and tardy operation of the origanization of courts of justice to pass upon questions momentously affecting their rights and liberties. Why, then, would you postpone the adjudication of this question, when the people in their majesty and might occupy their places here in the persons of all those who hold seats upon this floor?

Sir, the gentleman from Nacogdoches is wrong if he believes that Sam Houston and Charles Fenton Mercer were not equally participators in this matter. Do not the history of the proceedings, the veto recorded in the journals, the very documents exhibited upon this floor, show conclusively that this contract was entered into after the voice of the people had declared it impolitic longer to continue the system? And are we then, sir, passing judgment upon a question in relation to which the facts are not known? Why defer the trial? Where are the just and high grounds for referring this subject to another tribunal than that of the people themselves? And we are here as their representatives. I, for one, feel all the responsibility imposed upon me as such; and I can see no just grounds for referring

the trial to any other tribunal. I believe that the case is fully made out. I believe that all the testimony which can be adduced is now fully before this Convention. There is the law on the table, there the journals of Congress, there the veto of the President, there the contract in black and white. What more can the gentleman adduce? If, then, I am sitting here as a juror, and the gentleman will state any other point of evidence which he wants, I will grant him time to send for persons and papers. But let us not postpone the investigation unless there are just grounds for the delay. Are not the people as capable of determining this question through their delegates upon this occasion, as a court of justice will be, hereafter to be established? This question has been before them for years. They have spoken upon it through the Legislature of the country, and they desire now again to speak upon the subject here. And all I ask, so far as I am concerned, is that justice may be done to the country, that the equitable rights of her citizens may be maintained, and that a policy which has been found to be deleterious to her interest and prosperity may be checked.

Now, so far as the opinions of the gentleman with regard to the individual alluded to are concerned, I care nothing about them. The gentleman from Nacogdoches says he has been his bosom friend; that he would take him to his bosom, and be proud to call him friend. If such be the fact, possibly the gentleman is not deceived with regard to this transaction. But I do flatter myself that the country at large has been deceived. Because that individual was advised by friends, perhaps as warm and devoted as the gentleman himself, of the impropriety of entering into these contracts. If the gentleman has not been deceived, others have been most egregiously and outrageously deceived. But with the merits of this question, these matters have nothing to do. The gentleman knows as well as myself the course I have adopted with regard to that individual. I care not whether he may triumph over his enemies or not; I care not if he shall become the great polar star of this country or any other; it is immaterial to me—it is a matter of indifference to me; and if such be the fate of that man, I would not envy the gentleman the nearest association possible with him. But this has nothing to do with the great and permanent interests of the country; and I care not what may be the destiny of Sam Houston or of those who may cling to his skirts through both good and evil reports. I occupy the position I do without regard to *him;* and it calls upon me to give a voice and express opinions in my judgment best calculated to promote the true interests, prosperity and glory of my country. I care not whom or whose associations they may affect.

Mr. OCHILTREE said: I attach myself, Mr. President, to the skirts of no man. But an interest sure of justice, would, I trust, always prevent me from wronging any man; and I assure you, sir, that I would stand as fierce a champion of the gentleman from Fayette, or any other individual in this Republic, were censure to be thus cast upon him, without the semblance of trial, as this day it has been

cast upon Sam Houston. Sir, I profess not to be his champion; he needs none; he stands too far above the list of competitors to demand a champion in me. But as I have said before, I know nothing in the world with regard to the right or wrong of this transaction. I have never made myself conversant with the facts of the case; and when I was elected by the citizens of Nacogdoches county this question entered not into the canvass. I was not sent here to disturb vested rights, if such there were, nor to interfere with the smooth and even current of justice and of right; but to frame a Constitution which should preserve, unimpaired, our great liberties and immunities; to form an organic law, which we might hand down without a blush or tinge upon the cheek to our children and our children's children. I was not sent here to make war upon any particular interest, however hydra-headed. I am not a Hercules, nor would I wish to apply the brand or searing iron. All I ask of this Convention is, not do that in a moment of feeling which might be hereafter a blot upon our escutcheon. Why, sir, have we said in the Bill of Rights that every man shall apply for justice and right to the judicial tribunals of the country? The gentleman says, that we have all the wisdom before the House; I do not think so. We have said that the accused shall have the right to summon his witnesses, to confront his accusers, to be heard by his counsel, and shall not be subjected to a summary process. This is all that I ask; and, sir, do I ask too much, when I stand up here among the assembled representatives of the people of Texas and say to them, act not rashly and hastily upon this subject? There may be a badge of fraud. I shall not attempt to deny it; I know not enough of the matter to give a vote upon this occasion. But if I beg only this much, only the more forcibly is the individual alluded to called upon to rid himself of the charge brought against him. All that I ask, all that I have asked, all that I will ask for Sam Houston or any one else, is that he may have a fair chance before the tribunals of the country. When Belisarius, the renowned Roman general, who had so often led the armies of his country to victory, who had driven the enemy from the very gates of Rome, and brought the banners and standards of conquered nations to pile up in the capitol, when from being the possessor of a great fortune he came to wander a beggar in the streets of the Imperial City, as the story goes, he solicited the charity of the passers by in the simple words, *da Belisario abolum*—give Belisarius a penny. All that I ask for Sam Houston is, that he may have justice.

On motion of Mr. Lipscomb, the Convention adjourned until 4 o'clock P. M.

4 *o'clock P. M.*

The Convention met pursuant to adjournment.

Mr. LIPSCOMB said: In stating the reason why I cannot support the section as reported by the committee and amended by the gentleman from Fayette, I will remark that it is with exceeding reluctance that I shall vote against the amendment and the section. But I am influenced in so doing by considerations which will not allow me to in-

dulge any preference or any freedom of will which I might be disposed to exercise upon this occasion. It has been a principle with me, which has grown up with my growth, and I believe increased with age, to have something like veneration for individual rights. I believe that those rights, in all countries governed by law, should be subjected but to one test, that of the ordinary tribunals of the country. I believe that any other mode of adjudication is capricious, and subject occasionally to very great injustice. I have been accustomed to think that whenever a tribunal decides any matter of controversy, it should hear both parties, and weigh the evidence on the one side and on the other. We are called upon here to say that these contracts, solemnly entered into between the Republic and these individuals, shall be suspended and shall cease, thus directly destroying the contracts, and directly interfering with individual rights. I do not believe that we could, under any circumstances, go into the inquiry whether these contracts were founded in fraud or not. The gentleman who addressed the House in favor of the amendment, sustained it upon the ground that fraud in the beginning made them void *ab initio*. I am willing to say that they are fraudulent and void for the sake of the question; but if I were of that opinion, it would not justify me, standing here as a member of a Convention called for the purpose of forming a constitution embodying the great principles of the rights of man, that they were so. All we could do would be to provide a mode of instituting an inquiry as to that fraud. It is wholly immaterial whether they were fraudulent or not, whether constitutional or not. We are not sitting here to decide upon the constitutionality of a matter. In all countries governed by law there is an appropriate manner for doing everything. This course could only, it seems to me, be sustained upon the ground of expediency; and with regard to its expediency, there might be much difference of opinion. Perhaps we have all power in our hands, as to sheer power; but I deny the right we have to interfere with the rights of any man without giving him a hearing, and an opportunity to defend those rights by due course of law. In the section preceding, which we have adopted, we assert and sustain this great principle. I will read and call your attention to it:

"SEC. 20. The rights of property, and of action which have been acquired under the legislation and laws of the Republic of Texas, shall not be divested," etc.

I voted for the twentieth section as it passed, not believing it would give any constitutional or legal effect to the principle there declared, but merely as a declaration of the great principle which should prevail in all countries, that vested rights should not be interfered with. And now, in the very next section, we are called upon to divest a right. We admit it to be a contract, and are called upon to say it shall be suspended and cease. With all due respect to those who drafted and sustain this section, it does appear to me inconsistent and unfortunate that the two sections should be placed in juxtaposition, so that he who runs may read. It militates against this great princi-

ple which we have asserted and declared to the world, and against the morality which should enter into all considerations of this sort.

There is another objection, which is with me a prominent one. It will not be denied by any member of this House, conversant with constitutional laws, that if we were already in the Union, and should offer an act of the Legislature or the State embracing this very provision, no constitutional lawyer would say that act would be held to be constitutional by the Supreme Court of the United States; any lawyer would say it was void—unconstitutional and void. We are told, however, that we are not yet in the Union, and may engraft into our Constitution a principle repugnant to that of the United States with perfect safety—that there is no power that can revise it—that the Supreme Court cannot revise it. I do not think so. I believe that if we should be received, and if there should be any principle in our Constitution conflicting with that of the United States, it will come under the cognizance of that court, and be declared unconstitutional. But suppose we hold that it would not be subject to the revisal of the Supreme Court, and that, if we go into the Union now, it cannot be questioned hereafter. Are there not just grounds to believe that those in the United States Congress who are opposed to the annexation of Texas, as one party, and those who may conscientiously believe this principle repugnant to the Constitution, as another party, may, when acting together (for we have not many friends to spare in the Congress of the United States), form a sufficient force to defeat our annexation? Why so? Because this section is repugnant to an express provision of the Constitution of the United States. The latter clause of section 10 of the first article of that Constitution provides that no State shall pass any law impairing the obligation of a contract. Now, is it within the bounds of a reasonable probability to suppose that those men who feel indifferent towards us at the least, and those who may conscientiously believe this to be in violation of the Constitution, would not seize hold of this provision and make it an objection to the reception of our Constitution? Would they receive our Constitution under these circumstances? Would they take in a people as an independent State, who should have engrafted in their Constitution a principle repugnant to that of the United States? I think they would not. On a former occasion, I declared that I would put it to myself, and I believe that as good a way of reasoning as any other, what I would do under similar circumstances. And my best reflection and candid investigation brought me to the conclusion that if I were a Senator or member of Congress, and uninfluenced by any feelings for Texas, I should say I would not receive this Constitution, that I would vote for rejecting it, if it contained that provision. Now, believing as I do, that annexation is paramount to every other consideration but that of power, I would make any other sacrifice to obtain it; and this, if I am not mistaken, is the prevailing sentiment of the people of Texas; they will risk anything short of disgrace and dishonor. Some gentlemen say these contracts were void *ab initio*, and, therefore, not contracts; and yet they call them contracts

in the very declaration. This provision says they shall cease, and that it as much destroys their validity as if it should say they shall be void. Believing, therefore, that we should jeopardize our admission into the Union with this Constitution, no consideration could induce me to vote for this section as reported. And I have the same objection to the amendment. I will go as far as any one can, who entertains the same opinions that I do, to have these contracts arrested by due course of law if they have not been complied with, or if unconstitutional. I am willing to enjoin it upon the Legislature, that they shall not extend their time, and that they shall not relieve the contractors from any forfeiture which they may have incurred. I will be for enforcing the contracts to the letter. But let the courts do that—let us not attempt to do it ourselves, hearing, as we do, only one side of the question. I am opposed to repudiation in any shape. If we have got into difficulty, let us not violate the public faith, but sustain our honor and keep it untarnished, though we should be impoverished thereby. Strong appeals have been made to our sympathies. We have been told that these contracts violated the rights of the soldier, of the widow and the orphan, and of the early settler who assisted us in defending the country against the public enemy; that their rights have been postponed to the rights of new comers and contractors who have come here for mercenary purposes. If so, great injustice has been done. But let this matter come before the proper courts; let them inquire into it; and I have full confidence that they will say that those contracts which violated previously existing contracts were void on that account. I do not know the extent of the influence possessed by these contractors, but I fear it. In fact, I fear everything when a question can be raised upon the acceptance of our Constitution. The character of one individual, whose name has been handled very roughly to-day, once stood very high in his country's annals; few men have stood higher for virtue, talent and political influence than Charles Fenton Mercer.

If he had that influence now, and we should undertake to rescind his contract, we cannot expect that he will not attempt to prevent it. The influence of all those opposed to us will be combined, and we know from the newspapers that the northern people are opposed to our annexation, and are looking out for something to take hold of. It is true they are not looking in this quarter—they are looking for something relative to slavery; but the same men will lay hold of any other objection just as soon as that. Their object is to defeat the annexation of Texas, and they will defeat it if possible by availing themselves of all the means within their reach. And I can tell gentlemen, as lightly as they think of this matter now, they may think of it hereafter with regret, as I know that most of those who are now supporting this provision are devoted to the cause of annexation. I had intended to rest content with giving my vote against this section, without making any remarks upon the subject, but the more I have looked at it the more fully satisfied have I become that it is repugnant to the Constitution of the United States, that it is in

violation of the principles of abstract justice, and would be a ground for our rejection, and I felt it my duty to give, in a brief way, the reasons why I shall vote against it.

I will remark here, with regard to the provision alluded to in the Constitution of the Republic of Texas, that our situation is different from that of the body alluded to. That Convention was making a Constitution for an independent people, and there was no power which could revise its acts. It is not so with us. We are forming a Constitution to be subject to the Constitution of the United States, and I do hope that we shall carefully avoid inserting anything here which may be repugnant to that instrument.

Mr. BAYLOR said: As I shall be called upon, in common with other gentlemen of the Convention, to give a vote upon the section under consideration, I think it my duty briefly to state my reasons for the vote I intended to give upon this occasion. As we often see, sir, upon questions of the greatest magnitude and moment to the country, individuals distinguished for their age and experience come to very different conclusions. I have no doubt myself that these conclusions are honestly entertained, and I have a great respect indeed for the opinions of those who differ from me upon this occasion. I have known some of them long, and in their integrity I have the greatest confidence. And I trust and hope that I have as high a regard for the sacred nature of the obligation of contracts as any other, and I fully accord with the sentiment that they ought not lightly to be touched, that they ought not lightly to be annulled, canceled or set aside. Nothing short of the highest necessity, a necessity, sir, imperious in its character, ought ever to induce a deliberative body to place their hands upon a contract. I do not myself view this question as some gentlemen have done. For I do not think that the question of fraud has anything to do with the case now under consideration. I hold, sir, that, in the absence of all proof and all investigation of the subject, the presumption ought to be indulged by every gentleman upon this floor, that, so far as the contractors are concerned, they have acted in good faith, and honestly complied with their contracts. So far as fraud is concerned, it is a well established and settled principle that we never can presume it. We are not authorized to go into the field of conjecture; fraud is a question of fact, and like all such questions the fact must be proved. It consists in the intention; and I say that, in the absence of all proof, I am disposed, so far as I am concerned, to come to the conclusion that these individuals may have complied in good faith with their contracts up to the present moment, and to suppose that these contracts were made in good faith, and that there has been no fraud in the case. At least I am charitable enough to come to these conclusions until I see some facts or developments to authorize a different opinion. But I am disposed to look upon this question as one of policy, as one of a case of necessity. So far as I am able to judge of the matter, if we suffer these contracts to remain as they are, the consequences to the country will be distressing in the extreme. If we take into consideration the number of

these contracts, the immense districts of country which they sweep over from the Rio Grande to the extreme line of the frontier between us and the United States, if we contemplate for a moment the vast amount of territory embraced within this entire mass of contracts, we shall find that these individuals are getting a scope of country sufficient for at least two, if not three, States. Well, now, by the terms of these contracts, as I understand them, the contractors and their associates are not bound ever to alienate these lands, but they and their successors can hold them through all time to come. We have not acted as wisely in this as the Mexicans, of whose policy and wisdom we have so poor an opinion. They took the precaution to say that the empresarios should, within twenty years, sell the larger portion of their premium lands. Here they can hold them for all time to come. What an attitude the country will be placed in, a few individuals and their successors owning entire sovereign States! Will the consequences not be most distressing and ruinous? Look for a moment at the State of New York. See the riots and disorders, the feuds and contentions, which have grown out of a similar state of things there. The venerable gentleman from Washington tells us that he is extremely solicitous to maintain the national faith of the country. I too wish, so far as concerns the course of Texas, that her steps may be directed by a regard to the nicest principles of honor. While I accord with that sentiment, and would be as far from favoring repudiation as any gentleman, I do not conceive that the doctrine of repudiation is at all involved in the proposition now under consideration. For if I understand the history of this subject, it is this: that those repudiating States, in their madness and folly, have borrowed large amounts of capital in Europe and elsewhere, and seeing that they have got into difficulty, now contend that they ought not to pay the money at all. Is that the proposition before us? We simply say that we believe these contracts will be ruinous to the country; that justice and policy call upon us to cancel them. But do we not at the same time give the emigrants their lands, and say to the contractors that the halls of justice shall be thrown wide open to them, that they may get ample compensation for the amount of damage they may have sustained? Gentlemen say it is true that the Convention may have the abstract power to do this, but they deny the right. Now, so far as I am informed, the powers of a Convention have never been well defined. We are thrown back upon the principle that we are here representing the majority and sovereignty of the people. We are acting upon principles superior to any Constitution; principles above and beyond all Constitutions, because we are framing the fundamental law of the land, the Constitution itself. While I make this remark I wish it distinctly understood that I believe that neither this Convention nor any other deliberative body can ever feel itself authorized to act in any other way than as governed by the great principles of right and wrong. There is a moral fitness in things, which everybody and which this Convention are bound to respect if just men. While I subscribe to this principle, I do not see that we are interfering with it

or transcending our powers in annulling and setting aside these contracts. Because we say that we will give the emigrant all that he is entitled to, and throw open to the contractor the courts of justice, that he may recover any amount of damages he may sustain. The gentleman from Washington attempts to draw a distinction I am totally incapable of myself. It will be recollected that the Convention which sat at Washington annulled two gigantic contracts. Well, he tells us that the United States has agreed to take us into the Union with this feature boldly standing out in relief upon our Constitution. That government cannot complain, then, if we perpetuate the annulling or setting aside of these contracts. I cannot see the force of his argument. He attempted to draw a distinction between the case of a sovereign people framing a Constitution for an independent State, and that of one coming into the Union with a Constitution subject to a paramount Constitution. But I contend that there is no soundness in the argument, to say that though the government of the United States saw that the Convention at Washington had annulled these gigantic contracts, it supposed for a single moment that we would perpetuate this violation of contracts under the Constitution we are now framing. Because, if we do it, to set aside the contract of Mason under this new Constitution is just as much a violation of the principle referred to as to set aside that of Peters, Mercer or anybody else. The only difference is, that in the one case we are perpetuating the violation of contracts by a former Constitution; we re-enact this violation in the new Constitution and continue the evil. That is the only difference. For so far as the proof is concerned, with the exception of the mere declaration of the old Constitution itself, this contract of Mason's may be just as good as any since made. I cannot see any difference. It seems to me, Mr. President, to be the true policy for this Convention to annul these contracts. But, sir, in doing so, I hold that we ought to be governed by those principles of justice and liberality which ought to characterize any good people. It is in vain, because they have been made, to now say that they are impolitic and runious to the country. If so, it was folly and madness to make them. And for aught that appears, if we had not annexation, they might be very politic; it might be very important to have this vast wildnerness settled up by those who could defend the country. But inasmuch as we have annexation now, the whole policy of the country has changed. A friend requests me to take some notice of the constitutionality of the section under consideration. Now I believe there is no constitutional lawyer here who does not know that when a state is admitted into the Union its Legislature has no power to annul contracts. From the case of Dartmouth College down, all the decisions go to the same point, that a Legislature has no power to set aside contracts. But if we look at history we shall find that they have generally done so, without granting any compensation or furnishing the party with any means of resorting to the courts of justice to get adequate compensation. They have repealed those corporations without making any adequate or just compensation. But I hold that there is a wide differ-

ence between a Legislature doing this and the people by their deputies assembled in Convention. The Constitution of the United States says that no State shall do this thing, and I suppose Texas is not a State yet. It does not say that no Convention shall do it. Let me ask, sir, for what reason we have incorporated in our Constitution a section providing that private property shall not be taken for the public use without adequate compensation? It is based upon the idea that the public good may require such sacrifices to be made, and that private interest must yield to the public good. Where is the difference between thus taking private property and annulling such contracts as these if we make a just compensation? I can see no difference. Here we propose to do no more than to annul these contracts, and opening at the same time the courts to these individuals that they may receive a just compensation if injured thereby. I do not perceive that the Constitution of the United States will be injured by this measure, and I would myself, so far as I am individually concerned, be perfectly content to place in the Constitution a clause that nothing therein contained should be so construed as to contravene any provision in the Constitution of the United States. Then the anticipated crusade against our Constitution in the Senate and the lower House would be met at once by this sweeping and general clause, and we should have ample scope for our deliberations, and full power to adopt any principles which the happiness, well being and true policy of the country may imperiously demand. In any view I can take of the matter it seems to me that these contracts ought not to continue in existence. I should be perfectly willing to consider them as having been complied with up to the present moment. I am willing to give the contractors the premium lands to which they are entitled up to this time and something more. The resolutions of the Congress of the United States give us the entire jurisdiction and control over our domain. They calculate that it will pay our public debt, and say that we may dispose of it as we think proper.

In conclusion, I wish it distinctly understood that I do not wish to do anything which might be considered unjust or illiberal so far as the contractors are concerned; but I never can consent, as a humble representative of the people, to suffer cancers like these to remain upon the body politic; for one, I have the nerve to apply the caustic and the knife, and hazard all the consequences.

Mr. HOWARD said: Mr. President, that which distinguishes the government of civilized from savage life, is its respect for rights. With the barbarian, might makes right; but it is the boast of civilization, that by a government of laws wisely and uniformly administered, protection is afforded and justice administered equally to the strong and the weak. But when government is diverted from this end into an engine of opposition, and individuals obey, it degenerates into tyranny and becomes a curse.

It is proposed by an arbitrary edict of this Convention to abrogate and annul the contracts for colonization into which the Republic has heretofore entered. It is argued that we should pursue this extra-

ordinary course; first, because these contracts were unconstitutional; second, because they were fraudulent; and third, because the public policy of the country has changed since they were entered into.

In order to support this measure, the advocates of it have found it necessary to maintain that this Convention has power to do all things, unrestrained by any rule save its own notions of expediency. I deny this position at the very threshhold of the inquiry. The idea of *unlimited* power has no anchorage on this side of the Atlantic; it is associated only with the bowstring of the Sultan, and the knout of the Czar. To maintain such a position is to confound *right* with brute force.

While it is admitted in the discussion that the Legislature, even in the absence of a written Constitution, could but rightfully exercise such a power, it is insisted that this Convention, as the depository of all the people, has no limit but its discretion. I deny the position. The Convention, as the depository of political power, can, in the nature of the case, possess no more power than a majority of the people. Admitting, for the sake of argument, that the people have delegated all their governmental power to the Convention, the power of the latter cannot exceed that of the people, which is the right of the majority to adopt such measures as will ensure the peace, security and happiness of society. Whatever may be the brute force of the majority, I deny its power, as a question of right, under the pretense of governing, to adopt such measures as tend to the dissolution of society and the destruction of social order. I maintain that government, whether the ultimate sovereignty be lodged in the hands of a few or the whole people, has no right to violate the laws of nature or the social compact. When man submits himself to the laws of society and government, he surrenders so much of his natural liberty as the legitimate ends of society and government require; but he does not yield that which would be destructive of all society and his own existence. In England, where the Parliament is declared omnipotent, it is a well-settled axiom of the law that a statute contrary to the law of nature is void and need not be obeyed.* Nor is this the mere speculation of the philosopher in his closet. It is a part of the jurisprudence of the country. In the cases of Calder & Ball, Fletcher & Peck, and Terset & Taylor,† the judges of the Supreme Court of the United States hold that a law violating the social compact, or natural justice, would be void on general principles, independent of constitutional inhibitions. And the illustration they put are the cases when the Legislature should declare an act criminal which was innocent in itself; or make a man a judge in his own case; or take the property of A and give it to B, all of which they say would be void on general principles without the aid of the Constitution. The great commentator on American law asserts that the right "to acquire and enjoy property is a natural right."* Burlamaqui declares that though the Legislature be a *supreme*, yet it is not an *arbitrary* power; but, on the

* 1st Co. Litt., 341, a; 1st Bl. Com., 58, 41, 43; Legal Maxims, 17.
† 3d Dallas, 386; 6th Cranch, 87; 9th Cranch, 43.

contrary, it is limited in several respects. Again he says the sovereign has rights "over the estate of his subjects principally in three different manners." The first is regulating the use of it by law. The second, raising subsidies and taxes. The third is the right of the eminent domain. It should be recollected that the author is treating of the exercise of power in monarchial governments. It is certainly a singular opinion that government, in a country of written constitutions, is less restricted than in absolute monarchy; or that the majority of the people may tyrannize through the means of the majority to an extent beyond the recognized power of the Tudors in an age of absolutism. If so, we have made but small progress in the science of government on this side of the Atlantic. Oppression is but sanctified because done in the name of the people. The two first grounds assumed for annulling these grants are that they were fraudulent and unconstitutional in their inception. It is not denied that these are purely judicial questions; but it is said that the Convention possesses all power if it sees fit to exercise it—legislative, judicial and executive. Be it so; if it proceeds as a court, it must clothe its proceedings with judicial powers. If it proceeds to annul a grant on the ground of fraud, the party must have his day in court. He must have notice—time to procure his witnesses and be heard at your bar in defense of his rights. It is a familiar principle to every lawyer that an *ex parte* judgment without notice, actual or constructive, is void, although the court with notice would have had jurisdiction over the subject matter; it is a universal principle, founded in natural justice, from which an *ex parte* judgment of this Convention abrogating a private right can obtain no exemption.

How is it proposed to conduct this proceeding? Fraud is charged in debate with the wildest declamation, without the shadow of notice, without a title of proof. Without so much as taking evidence before a committee, it is proposed to annul the solemn contracts and grants of the government! I say nothing at present of the monstrous injustice of so vile an act of repudiation; I deny the *power* of this Convention to perpetrate the deeds; I controvert the power of this government, acting through a Convention on a charge of fraud, to resume its own grant by an *ex parte* proceeding which denies a hearing to the grantee.

The position that these colonial contracts are unconstitutional is liable to the same objection. It is a judicial question, and must be judicially examined, after notice and a hearing allowed to the grantees. But the position is clearly unfounded. It goes upon the ground that inasmuch as there was a general lien upon the public lands for the payment of the soldiers and other public creditors, the grants to the contractors were unconstitutional. It is not pretended that there was any specific lien on the particular territory covered by these grants. The report of the General Land Office shows, that after discharging all militrry claims there will be left 180,000,000 of acres of public domain, which will be more than sufficient to discharge a public debt which no one estimates at more than $10,000,000. These contracts

are grants of all the territory within certain specific and descriptive boundaries, to be reserved for settlement by the grantees of a certain number of families, in a particular way, and within a certain time, to which families the contractors are to give not more than 640 nor less than 160 acres of land, with a further provision that to the government is reserved every alternate section, with a right to the grantee, in some of the contracts, to purchase the alternate section by paying $12 in cash and $640 in the liabilities of the Republic. It will be admitted that the contractors have paid a sufficient consideration to support the contracts. And in contemplation of law at least the advantages arising from the settlement of one-half of the land, with an industrious population, will augment in an equal degree the balance of the other half which is reserved to the government. It will also be presumed that the $652 for each alternate section, which the contractor pays, would be a fair compensation for the whole if no settlement had been made. In point of fact, also, it is questionable whether the government could have sold the land for as much in its own liabilities as the contractors have stipulated to pay. My own opinion is that these contracts have increased the ability of the government to discharge its debts, and that more will be realized from the alternate sections of a populated country than could have been obtained from the whole of a district which would have remained for many years a mere hunting ground for the Indians. But whether the policy and the contracts were wise or unwise in a financial point of view cannot affect their validity in any legal bearing of the question, as it is not doubted that the Legislature had the right to sell the public domain, and that these grants were made under its authority expressly delegated for that purpose. Admitting, however, for the sake of argument, that the law and grants are clearly unconstitutional, still I maintain that the question cannot be examined in this form, but is open to judicial inquiry only.

It is urged by the member from Fayette, Judge Baylor, that since these contracts were entered into annexation has taken place and the policy of the country is changed, and that we have a right to annul these contracts and take the land for public use.

It is an elementary principle of international law that a revolution or change of government does not affect any pre-existing private rights. This principle has been repeatedly affirmed by the Supreme Court of the United States in passing upon French, Spanish and British grants. [Vattel, B. 3, C. 13, sec. 200; 7 Peters, 54.]

The change of policy can give no additional power to the new government over prior contracts and grants. The new government in this respect occupies precisely the condition of the old without acquiring any more jurisdiction.

The right to take private property for public use, or the right of eminent domain, is a different principle, and stands on other grounds. The principle itself is one of limited character, confined to the right to take in war the property of individuals necessary for the public use, and in other cases not extended beyond the right of way and its inci-

dents, and the right to take and destroy property in cities for the public safety. It must be clearly a case of public *use*, and not a measure merely to swell the public treasury or to consult some fancied public policy, like the measure proposed. And Chancellor Kent states the uniform modern doctrine to be, that when private property is taken for public use, a compensation must *first* be given or provided, or the act of appropriation is void. The section under consideration provides no compensation, but only the desperate remedy of suit against the State for indemnity, without any means of payment in case of a recovery.

The same jurist says that "it undoubtedly must rest (a general rule) in the wisdom of the Legislature to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the Legislature should take the property of A and give it to B, or if they should vacate a grant of property, or of a franchise, under the pretext of some public use or service, such cases would be gross abuses of their discretion and fraudulent attacks on private right, and the law would be clearly unconstitutional and void." (2d vol. Kent's Com., 340.)

Who does not see that this is an attempt to vacate a grant of property under the fraudulent pretext of public use? It is a barefaced attack on private right, without a pretext of public use, which always proceeds on a supposed public necessity. There is no necessity for taking this land for the public use, for the State has without it one hundred and eighty millions of acres of vacant public domain. It has no use for it, even as a territory to populate. On the principle of taking property for public use, it would be much easier to justify a seizure of all the money and personal property of its citizens. For such an act it might plead some necessity in the wants of the public treasury; but for an appropriation of these wild lands, of which she already has more than enough, no justification can be shown. It would be an undisguised and unjustifiable act of public aggression. Let us see the practical operation of this principle as sought to be applied by the learned gentleman. There is no provision in the Constitution of the United States which forbids Congress to pass a law impairing the obligation of contracts.

Suppose, then, some anxious aspirant for the Presidency, surveying the vast valley of the Mississippi, studded with cities and towns, and teeming with opulence, should say to the balance of the Union, we sold this country for a mere trifle; since then the Indian has been expelled, the forest subdued, and the face of the land crowned with the riches of civilized life. It is obvious *the public policy* has changed. We want this country retransferred to the public domain to raise means to pay the public debt and carry on splendid national works. There is no difficulty in the way, for it has been discovered by a learned judge in Texas that we have a right to annul our former sales and take the country for "public use!" And if the principle insisted on be correct, the government might sell the same territory, and then resume the grant as often as the speculation should be found profitable.

The Convention is urged to prompt action on this matter by many of the gentlemen who have addressed you, sir, for the reason that when we shall have been admitted into the Union it will not be in our power to take such action in consequence of the prohibition of the Federal Constitution. Sir, I maintain that we are now restrained by that great instrument from the adoption of the measure proposed. The Constitution of the United States forbids any *State* passing a law which impairs the obligation of a contract. Texas is not at this moment an independent State. We have accepted the resolutions of annexation passed by the Congress of the United States. We have already parted with a portion of our sovereignty. We cannot make a separate treaty with Mexico, nor enter into alliances or separate treaties of commerce with foreign powers. The resolution declares "that Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be created into a new State, to be called the State of Texas, with a republican form of government to be adopted by the people of said Republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." The consent of the existing government has already been given, the resolutions have been accepted by this Convention, and that acceptance signified to the cabinet at Washington, and the troops of the Federal Government have taken possession of the country. We are created into a *State*, with a compact for final admission into the Union as soon as our Constitution shall be presented, and be presented with a republican form of government. We come, therefore, within the language of the prohibition of the Federal Constitution, which declares that "no State" shall pass any law impairing the obligation of a contract. We are under the flag and the protection of the Federal Government.

Whatever may be thought of this view of the subject, I cannot be mistaken in the position that no clause in a State Constitution can be valid which violates the Constitution of the United States. Such a provision could have no higher sanction than an unconstitutional act of a State Legislature. It will not be contended that it is in the power of Congress to make valid a State law which violates the Federal compact. Neither is it in the power of a State, by revolutionizing, throwing off the ordinary forms of legislation, and acting through a Convention, to pass a law impairing the obligation of a contract. The resolution of the Convention would still be a law, and the law of a *State*. It is not in the power of a State to evade the prohibition by a change of forms or names. The Constitution of a State is a material part of the law which admits it into the Union. It must be obvious, therefore, that a section in it contrary to a provision of the Federal Constitution, as well as the act of Congress ratifying it, would be unconstitutional and void, as much so as an act of the Legislature passed a century after its admission. They both stand on the same footing as *laws* of a State. For it has often been decided that each section in an act of the Legislature which presents a distinct and independent

proposition is a law, and that one section may be valid and another void, and in relation to a Constitution the rule is the same.

This section of the General Provisions of the Constitution would be the law of a State, and if valid of the highest import, because embraced within the organic law itself. Does it impair the obligation of a contract? In the cases of Fletcher and Peck, Terret and Taylor, and in the case of the Dartmouth College, it was decided that a grant of land by a legislative enactment, or by virtue of a law by the Legislature, was a contract, and protected by the Constitution, whether the grant was executory or executed. That it amounted to a contract on the part of the State, that it would not resume the grant, and the State laws intended to have that effect were pronounced null and void. The further ground was taken that the party granting could not annul its own grant for fraud or illegality, but that it could only be done by judicial enquiry. The twenty-first section of the general provisions is a profound law, which proposes to annul and resume grants heretofore made in pursuance of an act of Congress. It would therefore be a law impairing the obligation of a contract, enacted by the party making the grant, and in every view of the case would be a nullity.

We are asking too much of the Congress of the United States when we require them to ratify a State Constitution which contains provisions violating the Constitution of the Union. We are asking them to ratify what, by their oaths, they are bound to reject. By such a course we are jeopardizing our admission within the Union and the whole measure of annexation. Are gentlemen willing to take this responsibility for the sake of adopting a resolution which would be void if inserted in the Constitution, when the whole effect of it could only be to delay the ratification of the Constitution, and might result in its final rejection and the loss of this great measure?

The effect of the measure proposed upon the contractors would be precisely contrary to that which is desired by its advocates. So far from operating to annul the grants and deprive the contractors of their premium lands, it would discharge them from the conditions and all obligations to complete the settlement. It was decided by the Supreme Court of the United States, in the case of Arredondo, upon well settled principles, that when the government, by its own acts, rendered it impossible for the grantee to comply, he took the land absolutely, and freed from his part of the contract. There is no doubt that the adoption of the twenty-first section would have the effect to release the contractors from the introduction of the settlers, and at the same time enable them to demand not only their premium lands, but all the advantage they might have derived from their contracts with the settlers in being authorized to stipulate for giving less than a section to a family. In other words, they would receive all they could possibly have received from a full compliance It is not the part of wisdom for the State to place these contractors in such a position that we cannot take advantage of any failure on their part to comply with the grants. If they are fastened upon the country, it is mani-

festly for the interest of the State that the population should be introduced and the line of our frontier extended.

Much declamation has been introduced into this subject which does not belong to it, and is entirely foreign from the question in debate. We are constantly reminded of the poor soldier who by these contracts has been deprived of this territory upon which to locate his lands. Sir, there is still a boundless territory open to his claims. But the poor soldier has in reality little interest in this question. Unfortunately he parted with his claim for the small pittance which his present necessities demanded, and this land scrip is now in the hands of a few speculators who wish to destroy these grants that they may seize upon and appropriate the country which the capital and population introduced by these contractors has rendered valuable. It is not the soldier, but the speculator, who is clamorous for the destruction of these grants. For my own part, I had rather see the country populated with small proprietors, actual cultivators of the soil, than to see it monopolized by a few large landholders who will retard its settlement and growth. The country appropriated by these grants is remote from market, and far better adapted to small grain and grazing than the growth of the heavy staples. It is a country which offers many more inducements to the farmer than the planter. In the hands of an industrious population from the western and northern States it will become prosperous and opulent. It is true that a large portion of the emigration to this region is European; but the honest and laborious German has always been found a valuable citizen in every part of the Union. His industry, his love of social order, and his attachment to our institutions, are proverbial. He will force back the savage and carry civilization into the useless and unproductive wilderness. Let us, then, maintain the interests and honor of the State by upholding right and rejecting a measure which, if adopted, would cover us with indelible disgrace. I do not object to any judicial enquiry into the validity of these contracts, but I protest against this arbitrary edict of confiscation, alike tyrannical and impotent.

Tuesday, August 19, 4 *o'clock P. M.*

The question now recurred on Mr. Mayfield's amendment to the twenty-first section of the general provisions.

Mr. MAYFIELD said: Before the vote is taken, Mr. President, if I have the leave of the Convention, I desire to submit a few remarks in addition to those I have made upon this subject, elicited by the course the debate has taken. And, first, I will state that I shall be gratified if gentlemen will join me in another measure which I will offer to the consideration of the Convention, by which we can reclaim to the country from forty-two to fifty-five millions of acres of land, which are at present held up and at the disposition of the fraudulent land operators of this country. We can do this without doing injustice to any, without violating any correct principle, without infringing in the least degree the constitutional rights of every man, or acting in opposition at all to the Constitution of the United States or that of

Texas. And at the same time I think we shall be keeping ourselves within the line of our duty, and not in the least degree jeopardizing the adoption of our Constitution by the government and people of the United States; and that by doing this, we shall relieve the people of Texas, who are bound down by a heavy debt which they are under the most serious obligations to discharge, and extend justice to those who are truly meritorious.

I have occupied, Mr. President, the time of the Convention on two occasions upon the present question; and I return my most hearty and cordial thanks for the attention with which I have been favored. It is one of vital importance; one upon which many entertain serious and perhaps conscientious doubts with regard to the mode of proceeding which should be adopted, to guard and protect the safety and interest of the State on the one side, and at the same time to do justice to individual rights. Now, sir, for my own part, I do not seek, and I am satisfied that no gentleman who joins with me in the opinions I entertain upon this subject desires to violate or infringe, in the least degree, any settled principle of international law or regulation of civilized society. And, sir, I flatter myself that there are many upon this floor who do not feel that when they entertain and express these opinions they are in that degree becoming as uncivilized as the common savage or the Comanche who roams over your prairies or may disturb the quiet or repose of your frontier settlements. I flatter myself that those entertaining the opinions I do, and who will express them by the vote they give here upon this occasion, do not conceive that they are classing themselves with a band of robbers. Why, sir, are honorable gentlemen entitled to indulge in denouncing all who differ from them upon this subject? Is it because they have expelled the savage from these halls? Is it because that class whom they seek to protect have expelled the savage from the line of the settlements? Is it because these free communities, so much eulogized by one of the honorable gentlemen, have given peace and protection to your frontier? No, sir; others have done it; the strong arm of the freeman of your country has done it; it has been the work of those who seek to maintain the institutions of the land as they exist; of men, sir, who seek not only to give Texas existence, but at the same time to give her a character above reproach. These are the men that have given us the privilege of deliberating here and discussing these questions, where in former days the rude savage had his resting place. And are those who entertain the opinions I do, and propose to reclaim this ground from the gripe of the greedy speculator, to be thus stigmatized as worse and more brutal robbers than the wild Comanche? Sir, what are the results to be attained by pursuing a different course? We are told by an honorable gentleman that the establishment of vast free labor communities on our western borders will be the consequence of carrying out these contracts. He did not say it, perhaps, but that is the inference from his language. He told us, however, that he would rather see one man of such a class occupying the soil than perhaps fifty or a hundred greedy land speculators. Sir, by the opera-

tion of this system, what do these gentlemen build up? Do they build up an untrammeled class of free and independent population? No, sir. They create little principalities or dukedoms, under the control of princes, who, like one already among us, wear sprigs of live-oak or cock feathers in their hats as an indication of their superiority. This population has no intercourse with the great mass of the people. Whom does this system benefit? Does it inure to the maintenance of the institutions of the land or to the general benefit of the country? No, sir. When these emigrants are settled, the petty duke or prince is their master. What further result does it lead to, sir? I am as little of an alarmist as other men; but let me ask you, what will be the practical result of this system? In time Texas is to be divided into States with equal and independent powers; and the consequences will be that the establishment of free States, where slave labor is not to be employed, will be demanded at your hands. Now I will boldly avow upon this floor, not as the representative of the county of Fayette alone, but of the people at large, that I am willing to make a declaration upon this occasion that no State shall be established unless it carries with it the institution of slavery, and in doing so I believe we shall express the sentiment of every man, woman and child within the just limits of Texas. Will you, then, by a secret and underhanded policy, establish these little petty dukedoms and principalities, which, in after time, may become free States upon your borders, and within the latitude and limits of a country exclusively appropriated as well by policy as by nature and character of the soil and productions to the employment of slave labor? Again, I ask, to whom do the benefits of this system inure? Not, Mr. President, to the representative of the poor soldier who died at the Alamo, or fell upon the plains of Goliad, or was made a sacrifice with Fannin; for none of these rank or class themselves with the speculators of your land. They are only asking that poor bounty for the services of the soldier and the patriot which the universal sentiment of mankind has awarded them. These claims are yet, in many instances, in the hands of the poor representatives of such people; and they but ask of their country an equal share in the distribution of these lands which their kindred fought for. But the true speculator is he who will come with this great body and mass of free laborers, who, instead of making them freemen when he presents them upon your soil, will, in the first instance, exact a contract from them before they leave the shores of Europe, and upon their arrival in this country will rob them of the portion to which they are justly entitled. If this population is to be introduced into our country, sir, I want them to come as freemen, and not as the serfs of any petty prince, or duke, or company. I want them to come as freemen, willing to identify themselves with the institutions of the land; to come of their own free will and accord, with a proper understanding of our institutions before they leave their homes.

I say, therefore, Mr. President, inasmuch as the whole question has been thus presented, that upon this occasion we cannot do better than

boldly to assume the responsibility imposed upon us, and devote ourselves to the consideration of the subject in such a manner that we shall do injustice to none, but at the same time be just to ourselves and establish a principle which will clearly and indubitably maintain the character and interest of our country, its honesty and prosperity, and manifest to the world a disposition to economize our means for the payment of the public debt, and the support and maintenance of the government.

I am sorry to be constrained to allude so often to the remarks of the honorable gentleman from Bexar; but, sir, we have been so often lectured by him with regard to the performance of our duties, and his strictures have been so severe and caustic in their character, and apparently in some degree aimed at myself, that I cannot refrain from noticing them upon this occasion. His philosophy, sir, it seems to me, is wholly inapplicable to the case; and in truth, so far as his argument of yesterday is concerned, he reminds me of the Scotchman who was called upon to define metaphysics, and said, "If you see one man talking to another, and the man talked to does not understand what the other is talking about, and he that is talking dinna ken what he is talking about himself, that is metaphysics." Now the gentleman's philosophical and metaphysical conclusions seemed in some degree of that character yesterday, for he entered into abstractions which, I flatter myself, so far as this question is concerned, no man in this Convention understands as applicable. His genius and imagination, however, may have induced him to believe them applicable to the case under consideration.

I hold that this question is one exclusively of policy; or rather that policy independent of other considerations does direct that we should act upon this question without fear. When we come to look at the true facts of the case we find that some twenty-four millions of the public domain of Texas are occupied by the location and survey of certificates pronounced fradulent by the tribunals of the country established by law. And when we come to estimate the area of the land to be squandered away among these various contracts, we find that it amounts to about as much more. Now, sir, the question presents itself to the consideration of the people of Texas whether upon this occasion we should not adopt some act whereby these lands might be reclaimed to the country to support her credit and maintain her institutions; whether the people of Texas, by their delegates in Convention assembled, will wrest them from the greedy hands of these speculators, and appropriate means thus afforded to the honest payment of the national debt, contributing something to the support of common schools and the purposes of education in the land. The true issue is not one between Sam Houston and anybody else; it is one of justice and right between the country and a set of harpies who have preyed upon it from the time of the organization of our government down to the present period.

The ayes and noes were called upon the amendment, and stood as follows:

AYES—Messrs. Armstrong of R., Baylor, Bagby, Brown, Burroughs, Caldwell, Clark, Davis, Evans, Gage, Holland, Horton, Hunter, Jewett, Jones, Latimer of L., Latimer of R. R., Love, Lumpkin, Mayfield, McNeil, Moore, Ochiltree, Parker, Runnels, Standefor, Tarrant, Van Zandt, White, Wood, Wright and Young—32.

NOES—Messrs. President, Anderson, Bache, Brashear, Cazneau, Cuney, Darnell, Everts, Hemphill, Hicks, Hogg, Howard, Irion, Lewis, Lusk, Lipscomb, Milller, McGowan, Navarro, Power, Rains, Scott and Smyth—23.

So the amendment was adopted.

Mr. Young moved the adoption of the section.

Mr. RUSK said: I look upon this, sir, as a most important question. To my mind, though I may be mistaken, it presents the direct issue of the success of the cause of annexation before the Congress of the United States or its failure. It is, sir, an important matter, when we take into consideration the gigantic and stupendous speculations embraced by these contracts. That they are unconstitutional I firmly believe. That they were obtained by fraud, or are fraudulent in their nature, I firmly believe. But the Convention in this article treats them as contracts, and if they are recognized as contracts to set them aside would be to violate, to my mind, a plain and palpable provision of the Constitution of the United States. I will not detain the Convention by going into an argument upon the constitutionality or fraudulency of these contracts. I must, however, be permitted to say that gentlemen who have argued the question of fraud have not argued it according to the principles of law. It is not necessary for the President to be corrupt to perpetrate a fraud. It is not necessary for the Legislature to be bribed. The law lays it down in plain language that two individuals may make a fair and honest contract, which is still a fraud. I make no charge against any officer of the government. There is one thing, however, that I will say: The history of these transactions shows that over thirty millions of acres of the public lands are chained up by these very contracts from the location of the earliest settlers of the country, of the soldier who served us in the darkest hour of peril, and of the heirs of those who have fallen battling for our rights. Yes, sir, and they contemplate that these very contractors may thereby amass in their own hands upwards of seven millions of acres of the public domain. But this is a digression. I believe when we get these contracts before the judicial tribunals, they will declare them unconstitutional, that they will declare them a fraud upon those persons having the highest right to locate the public domain. But while I believe them fraudulent and unconstitutional, I am called upon here to perform a solemn act; I am called upon here to discharge a duty, in the performance of which I owe it to myself and my country to act with caution; to the cause of republican governments to act with caution; to my posterity to act with caution, and to let no immediate circumstances influence me to come to conclusions and pursue a course which in my opinion may and will end in the defeat of annexation. An argument has been used which I regretted

to hear, because men, when they are anxious to do a particular thing, are easily persuaded; when they see such stupendous frauds as these, in their anxiety to defeat them they will act upon principles which would not otherwise guide them. It has been argued, unfortunately as I think, that the Congress of the United States has no right to inquire into the acts of this Convention in the fundamental law of this land; that we are not in the United States, and this is an act preparatory to our going in. But, sir, there is a fallacy in this argument. Is this act made with reference to Texas acting as a separate and independent government? No, sir; but with reference to Texas considered as a State in the Union. It is as much an act of the State if our Constitution is afterwards accepted as any act passed by the Legislature ten years hence. I regret extremely that I cannot, upon this subject, go with gentlemen whom I have often stood shoulder to shoulder. If I could do so without a violation of the Constitution of the United States, and without endangering the question of annexation, no man would go further. The Constitution, sir, which we shall here form will be a State law; not the fundamental law of a separate government, but the fundamental law of a State of the United States, and subject to the Constitution of the United States, and that Constitution declares emphatically that no State shall pass any law impairing the obligation of a contract. Then, sir, if we adopt the twenty-first section, I shall feel from the moment it is adopted that the fate of our Constitution in the United States is sealed. And I am not alone in my views of the subject. A gentleman learned in the law, a gentleman of age and experience, who sits near me, one who is not as easily moved by passion and feeling as I might be, after having reflected well upon the subject, entertains the opinion that if this clause is adopted our Constitution will be inevitably rejected. Let us pause, then, sir, and reflect. What will be the consequences? The people of this country are already highly excited upon the question of annexation—the hope of this event animates the bosoms of them all, from the Sabine to the Rio Grande. Everything is sought for with avidity which has the most remote bearing upon the subject. I, sir, in common with the people, believe that our hopes of futurity depend upon the consummation of this measure. Whether they do or not, the people believe it. The affairs of the country would be thrown into confusion, and turmoil and anarchy would follow the rejection of our Constitution by the United States. But, sir, if we are true to ourselves, we need entertain no fears.

I have indulged further in my remarks than I intended when I rose, having risen for the purpose of moving that the section, together with the amendments proposed, be referred to a special committee.

Mr. Love offered the following as a substitute for the section as amended:

The Legislature shall not have power to extend the time, alter, change or modify the conditions in favor of any contractor who may have heretofore made any contract for the introduction of colonists into Texas, under any law now or heretofore in force.

And in order to test the constitutionality, legality or validity of any such contract, the Attorney-General, as soon as practicable after the organization of the State government, shall institute legal proceedings against the several contractors to annul and set aside the aforesaid contracts, as well on account of their unconstitutionality, illegality and for failure to comply with the terms and conditions of the same.

And after judicial investigation, should it appear that any or all of said contracts are unconstitutional, illegal, or that the terms shall not have been complied with by the contractors, the court is directed to declare said contracts void and of no effect.

It is, however, declared that any colonist introduced before the adoption of this Constitution by the people, shall be, and is hereby, guaranteed the right and possession of any lands he may have acquired as a colonist under any agreement or contract made with a contractor. And it is declared that until the investigation can be had, as authorized by this Constitution, the right of any contractor to introduce any colonist under any contract, shall be, and the same is hereby, suspended.

Wednesday morning, August 20.

Mr. EVANS said: I meant yesterday, Mr. President, to have addressed the House, but was too unwell to do so; indeed, I am rather too unwell now to speak as I could wish. There are a great many topics coming up in connection with the subject which ought to be noticed. This question has a very important bearing upon the interests of Texas. I had trusted the Convention would give to it that mature consideration and full discussion its magnitude seemed to demand.

The people have called us to the performance of great and responsible duties. They have clothed us with their full authority—all the political power which the Republic of Texas possesses conferred upon this Convention, the people reserving to themselves the right only of passing upon our acts. This Convention has all the power over the political rights of the people. Whatever we do, if assented to by them, no power on earth can object to.

We claim as yet to be an independent sovereignty, and that this Convention represents that sovereignty. One of the most distinguishing attributes of independence is full and perfect jurisdiction over each member in the community, and over every item of property constituting their property.

My friend from Bexar (Mr. Howard), I had thought, established this doctrine in his argument on the contested election from Nacogdoches. He then enforced, in a strain of pure and lofty eloquence, the rights of freemen to pull down and build up governments at pleasure; that we, as deputies in Convention, were legislating in the very highest capacity of legislators—framing an organic law to last, unrepealed, for years; a basis on which all our rights may safely repose for ages.

He now, with other learned gentlemen, contends that the people in

I believe we could not do the United States a more acceptable service than to abrogate the contracts under discussion, and reclaim this immense domain, and hold it unimpaired as the fund out of which to liquidate our national debt.

I venture the opinion, though with great hesitation, that these grants were void from the beginning. That they are repugnant to the principles of our free institutions and in violation of the Constitution of the Republic of Texas.

I will again read from Vattel, page 176: "The prince or superior of society, being naturally no more than the administrator and not the proprietor of the State, his authority as sovereign or head of the nation does not of itself give him the right to alienate or dispose of the public property. The general rule then is, that the superior cannot dispose of the public property as to its substance. If the superior makes use of this property the alienation will be invalid, and may at any time be revoked by his successor or by the nation. This is the law commonly received in France, and it was upon this principle that the duke of Sully advised Henry IV. to resume the possession of 'all the domain of the crown alienated by his predecessor.'"

Now, there is no principle in our social compact, no power in our Constitution, which authorizes either the Congress or the President of the Republic to dispose of such extensive districts of the public domain.

Without pretending to be prepared to pursue this branch of my argument, I will state that our Constitution has its theory, made with reference to a certain idea, to which these contracts stand in obvious contradiction. In no country where the principles of absolute political equality are held true, principles which our Constitution is held to conform to, can any department of the government, without an express warrant, invest any one citizen with millions of acres of her public domain and to the exclusion, too, of the rights of her citizen soldier, and humble but honest pioneers, who had a previous substantive interest in this domain.

Again, Vattel says, on page 231: "But if a private person arrogates to himself an exclusive right to a country in order to be a monarch, people will laugh at his vain pretensions; a false and ridiculous possession can produce no real right."

I know these authorities are not directly in point. I read them, believing they bear very closely upon the subject.

If the vain pretensions of individuals to large districts of country with the view of building up a monarcy be regarded as ridiculous in countries not politically free, how ridiculous should such pretensions be regarded in our own country?

One of these grants is made to a German prince. What his visions of future aggrandizement are, I know not. Surely it would not be very consistent with our free institutions to permit him or Gen. Mercer, or the other contractors, to fill their immense estates with obedient vassals.

To place these contracts in the most favorable light, they must be

considered not as private or ordinary grants, but as grants of public policy, made for political ends; and, consequently, repealable at pleasure by the law-making power of Texas. The land specified in these contracts is not vested in the contractors, only so much as they may be entitled to as premiums for the actual introduction of emigrants, of which we propose not to divest them. The purpose for which the contracts were made was to ensure a rapid and dense settlement of our frontier districts of country. Had this policy been founded in wisdom, 'tis now no longer needed; it is superseded by the change now taking place in our relations with the United States.

But I assert that the object for which they were granted has been totally defeated by the manner in which the contractors have been carrying them out. Instead of sectionizing the country, building cabins and bringing families and settling them on the alternate sections, they have held back, importuning Congress for extension of time, waiting for the country to fill up with emigrants, with the fraudulent intention of deriving princely fortunes from their contracts without fulfilling any of the obligations on their part.

In the meantime, as emigration flowed into the country, from the pitiful quantity of land offered by the contractors, and seeing the country unprepared for their reception, the emigrant would leave the colony and go where he could settle himself free from any restraints, and procure as much land as he wanted.

The right to appropriate land, as special or private property, was a question long mooted among philosophers of other days. The great Locke laid it down that we could rightfully appropriate so much, and only so much, as we might need for the plough, or to graze our flock—only so much as we can mix our labor with.

No human power can sever from the great common of nature, and confer upon man, any more land than he can advantageously use for the benefit of his race.

These grants, then, are alike repugnant to the lessons of philosophy, the principles of our free institutions, and the policy of our country; and to abrogate them, we have produced authority from the law of nations and a precedent from the United States. May we not appeal to the candid and enlightened everywhere for the morality of our acts in annulling them?

With regard to the amendment proposed by my friend from Galveston (Col. Love), I feared it did not meet the mischief, and was constrained, though reluctant, to oppose it. I understand it to be a rule of law, thus in a grant with a condition subsequent, if the condition be varied by the grantor, or becomes impossible through the act of the government, the estate cannot be divested. I know not what construction courts may put upon these contracts; and think it not safe to dispense with any of the conditions. I fear in stopping the introduction of emigrants, we will be playing into the hands of the contractors, and enable them to reap princely fortunes, without expending a single dime, excepting fees to the lawyers for quieting their titles in the courts.

conventions assembled are limited in their powers. Neither he nor they have adduced any authorities for these doctrines. I know Kent's Commentaries have been read, an opinion of the Supreme Court of the United States has been referred to, neither of which bear them out.

I cannot urge against gentlemen that they have introduced no authorities. We are here on the extreme frontier, far removed from libraries. Oh, 'tis to be regretted that we have no books to aid us in our deliberations. Called suddenly together, with no previous preparation, laboring to dispatch the work before us in the shortest time allotted for the consummation of annexation, 'tis impossible to investigate thoroughly questions so much dependent upon the authority of history, of law and the principles of government.

I have just laid my hand upon Vattel's Law of Nations, and selected a few sections to read. Not having had time to arrange them, I must pray the attention of deputies to catch points as I read. Permit me, first, to state that, in my opinion, no respectable political writer or jurist ever advanced the doctrine that a people when in convention were under any law other than the great law of nature and of nations.

On page 51: "Nations being free and independent of each other in the same manner as men are naturally free and independent, the second general law of their society is that each nation ought to be left in the principal enjoyment of that liberty it has derived from nature; from this liberty and independence it follows that every nation is to judge of what its conscience demands, of what it can or cannot do, of what is proper or improper to be done. In all cases, then, when a nation has the liberty of judging what its duty requires, another cannot oblige it to act in such a manner."

Again, on page 175: "Everything in political society ought to tend to the good of the country; and if ever the citizens' persons are subject to this rule their fortunes cannot be exempt. The State cannot subsist, or administer public affairs in the most advantageous manner, if it has not the power of disposing on all occasions of all kinds of goods subject to its authority, it has the right of disposing for public policy of the eminent domain."

And, on page 64: "We may conclude from what has been said that if there arises any dispute in a State, on the fundamental laws, the public administration, or the prerogatives of the different powers of which it is composed, it is the business of the nation alone to judge and determine them in conformity to its political constitution; in short, all these affairs being solely a nation's concern, no foreign power has the right to interfere in them, nor ought to do so otherwise than by its good offices."

From these principles it follows that we can do anything which our conscience and our duty demands without consulting the wishes of any government or people. We can resume all grants, dissolve all contracts, and no nation can rightfully complain. In short, we can do as we may please—destroy all rights.

If we violate the law of nations by trampling down the rights of citizens of other governments, what is the remedy? Those governments may make it a cause of war, and war is the only remedy.

If we violate the law of nature by destroying the rights of our own citizens, or foreigners standing, as these contractors do, in the attitude of citizens, I affirm that there is no remedy, not even by war.

There is but one tribunal to which a people is held accountable, for violating any of the principles of natural justice; that of Him by whom all the actions of men are weighed.

Texas herself is the sole sovereign judge of what her duty or her conscience requires, and no power but the power of the Most High can call in question her judgment.

Again, on page 50: "The universal society of the human race, being under an institution of nature, that is the necessary consequence of the nature of man, all men in whatever station they are placed, are obliged to cultivate its dictates. They cannot dispense with them by any convention or private association. Where they unite in civil society, in order to form a separate state or nation, they may justly enter into any particular engagements with those with whom they associate themselves, but they are still under the obligation of performing their duty to the rest of the human species."

Yes; we are under obligations to perform all our duties to foreigners—to other nations—to the rest of the human species; but with regard to ourselves, we are under obligations to our own citizens to perform all our duties—to cultivate the dictates of nature—but responsible to no human tribunal if we do not.

The United States cannot complain of our action upon this subject, because the very thing we propose to do she actually did, or caused Spain to do, in the treaty for the cession of Florida.

During the pending of that negotiation Spain made large grants of land to certain individuals. In the treaty drawn up by Mr. John Quincy Adams and Louis D'Onis, it was stipulated that Spain should annul these grants.

I will read a part of the eighth section of the treaty as found in the land laws of the United States, in special reply to my distinguished friend from Nacogdoches, General Rusk.

"All grants made since the twenty-fourth of January, 1818, when the first proposal on the part of her Catholic Majesty for the cession of Florida was made, are hereby declared and agreed to be null and void."

The United States, by solemn treaty, demanded of Spain to annul certain grants. Now, I ask, was this in violation of the law of nature and of nations? Was it in violation of the Constitution of the United States? When Florida became a part of the United States the citizens residing upon her soil became *ipso facto* citizens of the United States. The treaty expressly annuls a large class of grants, depriving many citizens, holding under them, of all claims to their lands. The grantees, for aught I know, may have looked to Spain for compensation, but then the grants were gone and gone forever.

I believe we could not do the United States a more acceptable service than to abrogate the contracts under discussion, and reclaim this immense domain, and hold it unimpaired as the fund out of which to liquidate our national debt.

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Gentlemen assure us that the contractors have forfeited their contracts by a non-compliance with their conditions, and assure us that the courts will set them aside.

I have no great confidence in the integrity of human tribunals. When, where, has ever a large grant to land been set aside in the courts of the United States?

The Supreme Court of the United States has repeatedly affirmed grants upon principles of law which violate the plainest dictates of natural justice, as understood and felt by all men of sound moral constitutions, who are not trained to the profession of the law, or hardened by the commerce of the world.

In Arkansas, some years since, the most flagrant frauds ever conceived of were sustained by the courts, in what was then known as the Lovely claim.

The United States took from Arkansas, while yet a territory, a portion of her settled country and gave it to the Cherokee Indians. To remunerate her citizens for the loss of their improvements, Congress granted to each cultivator of the soil, of the years of majority, a half section of 320 acres of land.

Officers of government opened offices to hear proof and grant claims to those entitled to them. When these claims became valuable in market, a few speculators, in combination with some two or three or more of these same government officers, conceived the idea of supplying the demand; being very respectable, and scrupling to commit the crime of perjury, they resorted to various devices to still the expostulating voice of conscience.

Mudmen were actually made, named, and received claims in due form. Little boys with slips of paper on which were written the words "twenty-one years of age," in their shoes, were caused to swear that they were over twenty-one years of age.

These frauds were notorious. But the chief men of the country, the politicians, the lawyers and the judges, became the innocent purchasers, and they were all established—upon some principle or other of law. Perhaps thus fraud is never to be presumed—or perhaps thus no one can be heard against the official acts of government agents.

I cannot go with my friends in denouncing the Mercer contract as peculiarly fraudulent. I have had the pleasure of personally knowing General Mercer, and believe him above the suspicion of fraud; but he is a speculator, and, unfortunately for the interest of humanity, gentlemen of his order and class think it all laudable and right to make all they can out of governments.

I think favorably of the contractors of Peters' colony. They have done some little towards settling their colony; as far as they have gone I would pay them their premium lands.

No doubt this contract, and the others also, were conceived by our government to be for the best interest of the country. But, then, the contractors all have failed, wholly failed, to comply with either the letter or spirit of the contracts, and have forfeited all their rights under them. The interest of the country demands that we should

abrogate them. We propose to secure the contractors in their premium lands, and the colonist in his home.

I hope the House will pardon me for the very inartificial manner of my address, as I have no time to arrange my thoughts.

In conclusion, I will notice what seems to be the main argument of the gentleman from Nacogdoches (General Rusk), and pressed with more or less confidence by every other honorable deputy who has spoken in the opposition; that is, that Texas is already partially in the Union, and consequently under the Constitution of the United States, or that she will be before we could give this fiat any force. From this they argue that we can pass no law impairing the obligation of contracts.

Texas, up to this very day, is an independent sovereignty in full possession of all her powers. She can break off at pleasure her negotiations for annexation, can emit bills of credit, can make treaties which will be of binding force, until the final act of the Congress of the United States shall merge her sovereignty in that of the United States.

I might grant to gentlemen that Texas is now in the Union, that she can exercise no more power than can any one of the States, and that these contracts are of the description which fall within the meaning of the Constitution. Still Texas has the power to abrogate them. The people in Convention assembled might do so were Texas fully incorporated in the Union.

The language of the Federal Constitution is, no State shall pass any law impairing the obligation of contracts.

The term *law* means a legislative enactment, and not a Constitution, order or decree of the people legislating in their sovereign capacity.

The framers of this instrument have their minds directed certainly to the law-making power, and not to the judicial or sovereign power.

The argument and the authority produced to support it prove too much—prove that we are violating the Constitution in almost everything we do. We violated it to-day in extending the term of probation for a seat in the Legislature from six months to two and and three years.

I will read from 1 Kent, 417: "All incorporeal hereditaments, as immunities, dignities, officers and franchises, are rights deemed valuable in law, and when they are the supject of a contract or grant they are just as much within the meaning of the Constitution as any other grant."

President Jones and all the officers of the Republic have by contract a right each to his salary and the perquisites of their several offices. Their offices, every one of them, are just as much within the meaning of the Constitution as are these colony contracts. All should alike fall before the sovereign authority of the people; all should be dissolved for the public good—should be made to yield to the public will solemnly and conscientiously expressed in the organic law of Texas.

3 *o'clock P. M.*

On motion of Mr. Cazneau, the report of the Committee on Education was laid on the table, and the twenty-first section of the general provisions with the substitutes were again taken up.

The ayes and noes being called on the adoption of Mr. Love's substitute, stood as follows:

AYES—Messrs. President, Anderson, Armstrong of J., Bagby, Bache, Brashear, Burroughs, Caldwell, Cazneau, Clark, Darnell, Forbes, Hemphill, Henderson, Hicks, Hogg, Howard, Holland, Irion, Lewis, Love, Lipscomb, McGowan, Miller, Moore, Navarro, Rains, Runnels, Smyth and Ochiltree—30.

NOES—Messrs. Armstrong of R., Baylor, Brown, Cunningham, Cuney, Evans, Everts, Gage, Horton, Hunter, Jewett, Jones, Latimer of L., Latimer of R. R., Lumpkin, Lusk, Mayfield, McNeil, Parker, Power, Scott, Standefer, Tarrant, Van Zandt, White, Wright, Wood and Young—28.

So the substitute was adopted.

Mr. Brown moved to strike out the last clause of the substitute, in relation to the suspending of the contracts.

Mr. MOORE said: Although still feeble from the effects of my late illness, I feel called upon to make a few remarks upon this question. If we rescind these contracts, what will be the result? Suits will be instituted against Texas in the courts of the United States; the decisions may be adverse, and a heavy amount of damages be awarded against her. But if we let them alone they are harmless. The contractors cannot fulfill the conditions of their contracts. The terms are so rigid that very few colonists can be induced to comply with them to the very letter, and unless the Legislature is authorized to modify them, they will all fall by the act of the contractors themselves, and the lands will revert to the government and be a source of revenue. But perhaps it may be asserted that to suspend these contracts does not violate a contract. Mr. President, let me appeal to your own sense of honesty and honor, and I know that I appeal where these attributes are possessed—to pursue this course in a transaction with another as a private individual would bring the blush of shame upon your cheek; and will you consent to do that in a collective capacity which you would not do as an individual? Texas has been slandered; she has to exist but a little while as a nation, and while she does so exist, let her escutcheon be unsullied. If these were the last words I should utter, I would cry out to my countrymen to regard her honor as sacred to the last. It has been won with toil, suffering and blood, and I trust it will be preserved; I feel confident that there is honor and honesty enough yet among us to maintain it. But if this section prevail, I must consider that honor as tarnished. I believe that these contractors in Europe, many of them men of wealth, influence and intelligence, and also in the United States, will raise against us a cry of disapprobation; they will point to this measure as a stain upon our character, and charge us with dishonesty. While I use these terms, let me not be considered as casting one single reflection upon the

honorable members about me. I have seen the honesty and integrity which they have displayed here; but I know that the best of men, sometimes from prejudice, and sometimes from wrong information, are liable to act wrong. Whether a popular clamor through the country has urged some to sustain this measure, I know not. I am aware that there have been some cries of disapprobation recently heard along the frontier; but these opinions do not extend widely through the country. In my own section there have been but few complaints upon this subject, but few in the middle, few in the eastern sections. The people believe that these contracts were made under the authority of a law passed by the Legislature; they know they have been ratified by two of their Presidents; and they know that repeated attempts have been made to violate these contracts, and that the bills have been vetoed; and they have submitted and sustained the measure. I know of but few people in the country who are willing that a contract should ever be violated. They say the policy may have been bad in the beginning, but we must submit to the evil. They consider, and I believe correctly, that it would be dishonest, unjust and injurious to our national reputation to abrogate or even to suspend these contracts. But I believe it is the opinion of most intelligent men in the country that the conditions have not been complied with, and whenever they shall be investigated, I am satisfied that proof upon proof will be adduced to show that not one of the contracts can be sustained. Why, then, for fear of a remote evil, should we do an immediate wrong? I am too feeble to proceed further. I still hope, sir, that this question may be acted upon with that deliberation and caution and regard for the national honor which the subject demands.

The ayes and noes were called upon the motion to strike out, and stood as follows:

AYES—Messrs. Baylor, Bache, Brown, Burroughs, Cazneau, Cunningham, Cuney, Evans, Everts, Forbes, Gage, Hemphill, Henderson, Hogg, Horton, Howard, Holland, Hunter, Irion, Latimer of R. R., Lewis, Lumpkin, Lusk, Lipscomb, Mayfield, McGowan, M'Neil, Miller, Moore, Navarro, Parker, Power, Rains, Scott, Smyth, Standefer, Tarrant, Ochiltree and White—39.

NOES—Messrs. Anderson, Armstrong of J., Armstrong of R., Bagby, Caldwell, Clark, Darnell, Hicks, Jewett, Jones, Latimer of L., Love, Runnels, Van Zandt and Young—16.

So the clause was stricken out.

Mr. Caldwell offered the following, to come in at the end of the substitute:

"*Provided*, The amount of land so allowed does not exceed the quantity allowed to colonists by law."

Which was adopted.

Mr. Mayfield offered the following as a substitute for the substitute of Mr. Love as amended:

"The colonization contracts entered into heretofore with any contractors by the President of Texas, for the settlement and colonization

of any of the unappropriated lands of the country, are declared null and void; but all persons who may have been introduced, or emigrated to the country under the provisions of any of said contracts, and who shall be residing within the limits of said colonies at the time of the adoption of this Constitution by the people of Texas, and engaged in agriculture or any of the mechanic arts, shall be guaranteed in the quantum of land to which they were entitled by reason of their emigration. *Provided, always*, That the Legislature shall have power to pass laws necessary to enable said contractors 'who entered into contract with the President,' to institute suits against the State for the recovery of any indemnity in lands to which they may be equitably entitled, and grant to them the premium lands to which they may be justly entitled."

Mr. JEWETT said: 'I trust, Mr. President, that this House will see the propriety of adopting the substitute now proposed, and I cannot forbear expressing my hope that such will be the case. Every member who has spoken upon this subject has admitted the unconstitutionality and illegality of these contracts, and yet, sir, the phantom of *no annexation* seems to deter us all from adopting a remedy for this acknowledged evil.

"Now shrink the timid, and stand still the brave."

Sir, is the spirit of State Rights dead in Texas? The people expect us to pass some provisions securing to the soldiers of the country those rights which they won in the battlefields, and to the early settlers the redemption of the pledges made them. I know I cannot boast the age and legal experience of the gentleman from Washington. But I will not be deterred from the performance of duty by the apprehension of the rejection of our Constitution by the United States Congress. He has favored us with his scriptural reminiscences, and intimated that in relation to the abrogation of old grants to lands, made by our former Constitution, the language of that Congress to us may be, "Go, brother, sin no more." I, too, have read the Scriptures, and recollect another passage peculiarly applicable to this question. It is the parable of the barren fig tree. Our Saviour, when he approached it and found that it bore no fruits, uttered his malediction against the barren trunk, and said, "Cut it down; why cumbereth it the ground?" So, sir, would we say of these stupendous contracts that have been barren of all good to the country. Cut them down—let them no longer cumber the ground.

The ayes and noes were then called upon Mr. Mayfield's substitute.

Mr. RUNNELS said: The section as adopted, in my opinion, does not embrace the desired object. I voted for the amendment proposed by the gentleman from Galveston, and regret very much that I did so, for I believe that had my vote been cast the other way it would have produced a tie. I shall vote for the amendment offered by the gentleman from Fayette, because I believe it embraces the object designed to be reached by this Convention. I was disposed to compromise this question upon the amendment offered by the gentleman from Galveston; but inasmuch as the most important part of it, and

the only one calculated to secure the country any protection at all against these enormous speculations, has been stricken out, I shall vote for the substitute, or anything, in any form or shape in which it may be presented, which will suspend these contracts upon principles of equity and justice. What are these contracts? They are of a political character. They were made with a view to the settlement of the country and the protection of the frontier. Time has passed; the condition of the country is different; and this policy has therefore ceased to exist. I am fully satisfied that it would be equitable for this Convention to suspend the operation of these contracts until they shall be fairly and equitably adjudicated upon. I do not go to the full extent of the amendment offered by the gentleman from Fayette. I believe that the contractors should be entitled to the benefit of all their operations, their labors and expenditures. But I believe that the important interests of the country require and demand of us to abolish these contracts and pay the individual contractors the damages they may sustain in consequence thereof. If we permit these contracts to go on, it is emphatically that the State of Texas will never be able to pay her national debt. Then are not the members of this Convention satified that it would be equitable to suspend these contracts, political in their character, compensating at the same time the contractors?

Mr. HENDERSON said: I shall be called upon, Mr. President, to vote upon this question. I have listened with a good deal of interest to the arguments of gentlemen who have advocated the nullification of these contracts, and had hoped that, with all their ingenuity, they would have been able to present me some clause or section by which we could remedy the evil without endangering the annexation of Texas to the United States.

I have listened diligently to their arguments, and I must be permitted to say that I have not heard the first reason given calculated to convey to my mind the impression that the dangers pointed out by my friend from Washington can be avoided. I have come, therefore, to the determination that, so far as my vote is concerned upon this occasion, nothing shall divert me from the course which I am persuaded that the people of Texas, if they were here, and thought they understood this question as I think I understand it, would take. I am satisfied that they would say, if by adopting the clause proposed, or the amendment thereto, they would endanger the measure of annexation—they would say with one unanimous voice that they would be opposed to such interference.

Then the question results in this: shall we risk the great measure which we are sent here to advance by adopting the measure proposed, or shall we pass it by and suffer the evil? Who can doubt the choice which should be made? Sir, if I were asked to say whether Texas should remain free and independent, or whether we should give up the last foot of our domain, I would say we should abandon that and take annexation. Then I am opposed to the amendment, because I think it will infringe that part of the Constitution of the United States which declares that no State shall pass any law impairing the

obligation of a contract. Is this a contract? Have we not in the very section under consideration styled and regarded it as such? If it is a contract, illegal or legal, and we adopt such a clause in our organic law, we are offering to the United States and asking them to accept or approve a Constitution embracing a clause which does contravene an express and plain provision of the Constitution under which we propose to come and live. Is not this the case? And I would ask gentlemen to show me the difference between the power of a State after it is in the Union to pass a law impairing the obligation of a contract made by that State with any citizen, and that to place a similar clause in a Constitution which is to be submitted to the United States government for its sanction. Where is the difference? It is here, that in the one case the Legislature may repeal such an act, while in the other it is an organic law, and the objection, I take it, is more forcible to an act of this description than it would be to a legislative act. The United States has presented certain resolutions to us, which in substance say you may be admitted into the Union by adopting a Constitution, with the consent of your people and government, which is to be republican in its form, and it will be ratified if not anti-republican or repugnant to the provisions of that of the United States. But we are told by gentlemen that we have illustrious instances and examples where other States have impaired the obligation of contracts, and subsequently have been admitted into the Federal Union of North America. I grant the truth of the statement, and I say that these are not parallel cases, and for this reason: In the cases referred to the States that interfered with and impaired the obligation of contracts had done that act and consummated it before they asked admission into the Union. We on the contrary propose a Constitution to the United States containing the declaration of this effort to impair such an obligation, and ask their sanction to that. And what do we ask them to do by proposing this Constitution for their acceptance? We ask them to sanction this unconstitutional law. We have taken upon ourselves to say to the contractors, until you prove to us certain facts you shall not be permitted further to enjoy the privileges which you claim under these contracts. I care not whether they were legal in their inception or not; I do not pretend to say whether they were fraudulent or not, for this has nothing to do with the question. Let me ask gentlemen what we should gain by passing this clause, even though the United States should adopt it as a part of our Constitution? Suppose this Constitution were presented, and that no exceptions were taken to that clause, though plainly and palpably violating the Constitution of the United States, and that it should be adopted, would that make it legal and obligatory? Can the bare act of a majority of the two branches of the Congress of the United States repeal the Constitution? If not, then, I would ask gentlemen who advocate this provision, what good would result from enacting it here? Can it nullify these contracts? If I am correct in the view I take of this matter it will do no good. But let us look to the evil; what evil will it do? We are told by honorable gentlemen that it can result in no evil. But

suppose that my position should be regarded as a correct one by the members of the Congress of the United States, the consequence would be, to say the least, that this Constitution would be sent back to the people of Texas to have it reformed, and they would be required to expunge this unconstitutional provision. That is the least evil we could expect.

But, sir, when we look at the resolutions under which we are acting we see that we are to be admitted under this as one of the conditions, that we present a Constitution which shall be republican in its form, and in no degree contravening any provision of the Constitution of the United States, on or before the first day of January next. And we can only hold that government bound to us by the pledge of the public faith, provided we fulfill this condition by the time specified, otherwise the United States will be absolved from all sort of obligation to receive us at any period. That is the position in which we must regard ourselves as standing.

But, sir, we are asked by an honorable gentleman on my left to say what power can question our acts if we pass this clause. I, sir, feel my strength and dignity when I say here, as a representative of the people of San Augustine, that in this Convention I am forming a Constitution in part for them. But when I look to another quarter, I feel that I am controlled by a power more omnipotent than that people. I say it, not in depression of spirits, not as a humble man, but in all due respect to my own position and that of Texas, that we are controlled by the United States. We can derive no benefit from what we are doing here, unless what we do and say is sanctioned by that government. It is true that if we were acting as an independent State there would be no power which could control us; because foreign governments do not take it upon themselves to interfere with contracts between private individuals and any government. But is that the case here? Are we passing a law which alone requires the sanction of the people and government of Texas? Are we remodeling or reforming a Constitution which requires nothing but our own sanction here and the sanction of the people of Texas? If I understand the matter rightly, this Constitution requires not only the sanction of this Convention, and of the government and people of Texas, but the approbation of the Congress of the United States. That Constitution, under which we propose to enter and live, declares that Congress may admit new States into that Union, and that their treaties and laws authorize them to supervise the Constitution or organic law of a State which proposes to come into the Union. They have, then, superintendence and control over our acts so far as regards this organic law. Here we present them a Constitution which, upon its very face, contains an article contrary to the Constitution under which they are acting, and which they are sworn to support; and even if they should overlook this clause, and should adopt our Constitution with this in it, and it should turn out to be the case that it impairs in any degree the obligation of any contracts, I declare it as my solemn belief that notwithstanding Congress shall have adopted the Constitu-

tion containing this clause, yet, inasmuch as they have not the power to alter their own Constitution, it would be the duty, and the sworn duty, of the judges to declare it inoperative. The gentleman from Fannin referred to the treaty with Spain at the time of the acquisition of Florida as an instance in which the United States had suffered this course. Sir, what were the facts presented in that case? These, sir; that the Spanish government had made certain large and extensive contracts with individuals; and it is perhaps known by that gentleman, if not known by every other who has investigated the case, that the government of Spain had reserved the eminent domain; that she had the power to rescind these contracts whenever she chose; the power to say "from and after this day these contracts shall cease and be suspended." I would ask now, where has Texas reserved a power of this kind? If she has reserved it, it might have been a parallel case. With these views I shall oppose the amendment. If it were in the power of this government to suspend the operation of these contracts without endangering the great interests of Texas, and I were called upon to do that, on the ground that they were in their inception founded in error or bad policy, I might be disposed to say, "take from these individuals the contracts you have made with them, because they are against public policy," and I might want no other reason. But this is not the great question here, and I feel bound to enter my solemn protest against the adoption of any such provision. I would not hazard the success of the great measure we are called here to aid in consummating for all the public domain. I shall vote against that amendment, or any of a similar character, and in doing so I feel that I can lay my hand upon my heart and look in the face of God and say, "I have not sinned."

Mr. LOVE said: I did not wish to enter into a discussion of this kind. Although I did not myself question the power and right of this Convention, uncontrolled by the United States or any other power, to annul any contract, without the fear of any consequences, still I have been desirious to avoid it, more on account of the fears expressed by others than on account of any entertained by myself. Having failed in the object aimed at in the amendment which I offered, I am now prepared to vote for the absolute nullification of these contracts, and I think I can show conclusively that in doing so we do not interfere with any clause whatever in the Constitution of the United States. In the first place, we have heard a great deal about that clause of that Constitution which says that no State shall pass any law impairing the obligation of a contract. Now, sir, I deny the existence of a solitary dictum or decision among those of the Supreme Court, and I defy gentlemen to produce one, which applies that clause of the Constitution to the sovereign act of a State. Look at every decision upon this subject, and you will find that they apply exclusively to contracts between man and man in different States. And what was the object of the introduction of this clause? It was to prohibit a State from passing any law allowing its own citizens to repudiate a debt.

Yet we are told that it applies to the sovereign act of a State, and that it is contrary to this provision of the Constitution of the United States for a State to nullify a contract or declare it to be null and void. What did the Supreme Court say in the great Yazoo case? Did it not expressly recognize the right of the State of Georgia to nullify the contract in consequence of fraud, not through the judicial tribunals, but as an act of the State? I hold with the gentleman from Fannin, though I may be considered radical in my opinions, that there is no power but the power of God which can restrict the acts of this Convention in its legislative capacity, provided we frame and submit to the United States a republican form of government. That government has no right to question the power of a State to regulate its own internal policy. It has made but a single requisition, which is nothing more nor less than this: that we should regulate that policy in a republican manner. The States are sovereign and independent within themselves; and so that they have a republican form of government there is no power which can control them in the Constitution of the United States. By the Constitution of the United States a citizen is absolutely precluded from bringing a suit against a sovereign State. Where, then, sir, is the force of the gentleman's argument when he tells you that if you annul these contracts by your act in this Convention you do no good, but only give a right to Charles Fenton Mercer and others to prosecute suits against you for a violation of their contracts, when if he had turned to the Constitution of the United States he could have found that citizens are absolutely prohibited from bringing suits against a State? Let me draw the attention of the Convention to the state of things which will arise in the Congress of the United States, the thoughts of which make gentlemen so sorely afraid to vote for anything to secure the rights of the people. How shall we stand there? We, by a solemn act of legislation and in our Constitution, first declared that all the public domain should be subject to location under the claims of the men who participated in the revolution. Afterwards bonds and promissory notes were issued with the pledge that the public domain should be held sacred for the payment of the public debt. Subsequently the Legislature of the country, for a purpose supposed best at that time, made these stupendous contracts, said to embrace the enormous quantity of thirty millions of acres. I am not disposed to enter into the discussion of the question of fraudulency, for I wish to exclude everything not necessary to the proper understanding of the case. We then present our Constitution to the Congress of the United States for acceptance. We have arrayed on one side the soldiers, the bond holders, etc., and on the other Charles Fenton Mercer and the Dutch prince with their enormous claims. Now would gentlemen have me believe, under these circumstances, that the Congress of the United States, in a great national question which has overleaped all law and everything which has come in its way, would stop the prosecution of a great national measure and appoint a committee to investigate the fact whether the people of Texas had the right to annul these contracts; that they

would overlook the dangers connected with the subject of slavery upon our borders, and would say to C. F. Mercer, your claim is paramount to every other consideration, and we will reject this Constitution because you made with Texas a contract which, if carried out, would give you upwards of three millions of acres of land? Is not this the strangest idea that ever entered the brain of a sensible man, that they would reject our Constitution because, forsooth, we may possibly not have acted strictly within our constitutional limits? Now, what is the fact? It is asserted that we have legislative and not judicial powers. It is granted that we have the power to create courts to investigate any question we please, and to nullify or to declare them void if they choose. Now to make the principle good you must maintain that the power creating is a less power than the power created. Sir, is it to be supposed that the Congress of the United States would enter into such an investigation? When Louisiana was annexed to the United States it was thought to require an amendment to the Constitution. Now, what did the great Democratic party do, sir? Did they stop to cavil?. Not at all, sir. The Federal party said it was unconstitutional, and that this measure would arrest or dissolve the government, but the great Democratic party did not stop; they were satisfied it was necessary to the safety of the great American Union, and they carried it through.

The influence of C. F. Mercer has been alluded to. His contract, sir, was made under the most suspicious circumstances. I will not say it was made in fraud, as Captain Tyler would say, *per se*, but it was made contrary to the wishes of the people of Texas. And the President in any other country but Texas would have been impeached and removed from office. The bill which has been alluded to had passed almost unanimously the representatives of the people; it was vetoed by the President and passed over his head, and yet, in utter contempt of the wishes of the people, he made this contract with Charles Fenton Mercer, which gave him 3,500,000 acres of land. I do not wish to believe that he took a bribe; it was his self-will which induced him to carry out his own feelings, his own views and wishes, and then, as in many other instances, he chose to show his contempt for the people. Now suppose this matter to be investigated before the Congress of the United States, and that the contract of Charles Fenton Mercer is spread before them, does he come there recommended to their sense of justice? No, sir, but as one who has himself perpetrated a fraud upon the body politic of Texas. Upon the subject of the power of this Convention I will go so far as to say, sir, and I defy any gentleman to produce authority which will contradict it, that it has never been decided in the United States, either by the State Courts or the Supreme Court, that a State in framing a new Constitution has not the right to nullify any privilege she has before granted to any individual.

It was my wish that these matters should be investigated judicially, but this House having entertained a different opinion, and not having the slightest conscientious scruple upon earth with regard to our right

to nullify these contracts, I shall now vote to declare them null and void.

Thursday morning August 21.

The Convention met pursuant to adjournment, and was opened with prayer by the Chaplain.

Mr. Lipscomb offered the following ordinance, by way of compromise:

Be it ordained by the people of Texas, in Convention assembled, That all contracts with the government of the Republic of Texas for settling colonies be, and the same are hereby, annulled from and after the adoption of this ordinance by the people.

And be it further ordained, That all persons who are actually settled under such contracts shall be guaranteed in the quantity of land they claim under such contract: *Provided*, It shall not exceed six hundred and forty acres to a head of a family, and three hundred and twenty acres to single men.

And be it further ordained, That all persons aggrieved by the rescision of their contracts be authorized to sue the government of Texas to recover such premium lands as they may be entitled to.

And be it further ordained, That this ordinance be submitted to the people for their adoption at the same time the Constitution shall be offered to them; and if ratified by them, shall be considered binding and in full force to all intents and purposes.

On motion of Mr. Parker, the rule requiring the ordinance to be read on three several days was suspended.

On motion of Mr. Caldwell, the substitute of Mr. Love to the twenty-first section of the general provisions was taken up; and

On motion of Mr. Lipscomb, the ordinance and substitute were referred to a special committee, to consist of fifteen members.

Mr. Jewett offered the following ordinance:

WHEREAS, The various contractors who have entered into contract with the President of Texas for settling the vacant and unappropriated lands of the Republic have generally failed in establishing their settlements and giving that protection to the frontier contemplated by the terms of their contracts; and,

WHEREAS, The continuance of these contracts is highly detrimental to the public interests;

Therefore, it is resolved expedient to submit the following ordinance to the people of Texas, to be voted upon at the same time when they may vote for the adoption of the State Constitution, and if a majority of the qualified voters shall vote in favor of this ordinance, then the same shall have the force and effect of a law from the time the people shall vote thereon.

ORDINANCE.

Be it ordained and decreed by the people of Texas, That all colonization contracts for settling the vacant and unappropriated lands of the Republic of Texas, heretofore made with the President thereof, shall cease from and after the adoption of the State Constitution by the

people of Texas, but the rights to lands of actual settlers introduced by the contractors within the limits of any colony before the adoption of this Constitution by the Congress of the United States are hereby guaranteed, and the contractors shall have titles granted them for their premium lands, in proportion to the number of colonists introduced and settled within their respective colonies so soon as they may have established in the courts that their contracts were constitutional and legal, and that they have complied with the conditions of the same.

Mr. Cazneau moved a suspension of the rule requiring the ordinance to lay on the table one day, which was carried, and the ordinance taken up and referred to the special committee on colonization contracts.

Friday morning, August 22.

Mr. Young offered the following article:

It is hereby declared the duty of the Attorney-General of this State, so soon as the organization of the same shall be completed, to institute legal proceedings against all colony contractors, and if, upon investigation, all or any one of the colony contracts shall appear to have been unconstitutional, illegal, or that the conditions of said contracts, or either of them, shall not have been strictly complied with, they, or either of them, shall be declared null and void: *Provided*, That all settlers under the contracts shall be entitled to their lands as colonists: *Provided*, The same shall not exceed 640 acres of land to heads of families, and 320 acres to single men.

SEC. 2. In all suits when a citizen of this State may be a party litigant against any contractor, empresario, or other description of grantees, it shall be lawful for the person claiming to set forth any plea that it would be competent for the State to do, and the party may introduce testimony to prove the claim to have been forfeited, as well for the illegality, unconstitutionality, or on account of failure to comply with the conditions of the original grant, and the plea shall be good and valid in all such suits in this State.

On motion of Mr. Lewis, the articles were referred to the select committee to which was referred the subject of colonization contracts.

On motion of Mr. Rusk, the report of the select committee (Mr. Lipscomb chairman) upon the subject of colonization contracts was taken up.

Mr. Ochiltree moved to instruct said committee to report an ordinance.

Mr. HOGG said: Mr. President, inasmuch as I have hitherto said nothing upon this vexed question, I will attempt now to give my views upon this subject as concisely as possible. I feel as much as any man in this Convention the responsibility which I am under to my constituency and my country; and believing, as I do, that this question is one of more interest and importance than any which has arisen or will arise during the session of this body, I deem it proper that I should define my position upon the subject. I believe that we

are now about to approach one of the most sacred questions which can be agitated. If we incorporate anything in this Constitution repugnant to that of the United States, we are bound to suffer the consequences. The Congress of the United States will return our Constitution to Texas for amendment. Every member of this Convention certainly knows that the people of Texas are now wholly and heartily engaged upon the subject of annexation, and are desirous that we should take the most certain and practicable steps for its consummation. The question then arises whether we shall insert in this Constitution, which is to be the fundamental law of the land, an article which has been decided by men as learned in the law as any in this Republic to be repugnant to the Constitution of the United States. Is this a mere matter of fancy? Are men, sir, disposed to sport with the privileges dependent upon the speedy consummation of our union with the great American republic? Are they willing to take the bull by the horns and incur the responsibility of having this Constitution, as adopted, returned and suffer the consequences? I ask gentlemen to take a view of the state of things which would present itself in that event. It has been urged by many of our citizens that this country has too long knocked at the door of the American Union for admission. It has been urged by individuals, not now boldly and avowedly opposed to the measure, that annexation is impracticable. Then if you thus throw open the door to these men by inserting an article in your Constitution which will cause it to be returned upon your hands, in my opinion they will not, as now, keep dark, but will come up in solid phalanx in opposition to annexation. Some men of standing in the country will take the lead and use all their influence to create a powerful opposition. Sir, gentlemen are sporting with the question of annexation—the matter of all absorbing interest to this country. Then why will they say that they are determined to insert in the Constitution of Texas an article which is determined by men as much entitled to respect for their legal learning and constitutional knowledge as any men in the land to be in conflict with the Constitution of the United States. If gentlemen are so anxious to insert a provision of this kind, let us establish it as an ordinance. Then the body of the Constitution will remain perfect, and the rejection of this provision cannot immediately injure the annexation of Texas. I consider the question to be this: whether annexation is of the most importance, or whether it is of more importance that these colonization contracts should be declared void. It has been asserted by some as good patriots as any among us that they would be willing to give up all their lands rather than be thwarted in this measure of annexation. I believe, sir, that my constituents would rather give up all the public domain than to fail in this matter. I would cheerfully give up what lands I have rather than have that event procrastinated for six months. The eyes of the civilized world are upon us, and if we disagree among ourselves, what consequences may we not look for? Gentlemen say that the incorporation of this measure by way of an ordinance will cast suspicion upon it. Admit that it will throw sus-

picion upon it with regard to its constitutionality and legality, do gentlemen for a moment suppose that the eagle-eyed politicians of the United States will not as soon discover its character in the Constitution as in an ordinance? I am perfectly willing to insert it by way of ordinance. I am as much opposed to these contracts as any one, but I am not willing on this account to risk the success of annexation.

[The motion to instruct committee to adopt ordinance was adopted.]

COMMITTEE ROOM, *August* 20, 1845.

To the Hon. T. J. Rusk, President of the Convention:

The select committee to whom was referred an ordinance on the subject of contracts for settling colonies made with the government of Texas, also the substitute as amended by the Convention for the twenty-first section of the general provisions, and the substitute offered and several resolutions in relation to the subject, have had the same under consideration, and in obedience to the instructions given beg leave to report that this committee would respectfully recommend that the twenty-first section of the general provisions, and the substitute and amendments thereto, and the one offered, be rejected, and they recommend the adoption of the separate ordinance heretofore reported in lieu of the same.

All of which is submitted.

ABNER S. LIPSCOMB,
Chairman of Select Committee.

ORDINANCE.

WHEREAS, Various contracts have been entered into by the President of the Republic of Texas with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas; and,

WHEREAS, It is believed that said contracts are unconstitutional and therefore void from the beginning, and in their operations, if carried out, would operate as a monopoly of upward of seven millions of acres of the public domain of Texas in the hands of a few individuals, when in truth the citizen soldiers and creditors of the Republic of Texas had, by the laws and constitution of said republic, a clear and indisputable previously subsisting right to locate upon the public domain thus attempted to be assigned to said contractors; therefore,

It is hereby ordained and declared, That it shall be the duty of the Attorney-General of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas, and if, upon such investigation, it should be found that any such contract was unconstitutional or illegal in its inception, or that the conditions of the same had not been complied with according to its terms, such contract shall be adjudged and decreed null and void: *Provided, however*, That all actual settlers under any such contract shall be entitled to their quantity of land as colonists, not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man.

And in all such suits brought by or against any contractor, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead, and the party may introduce testimony to prove the claim or title to have been forfeited, as well for frauds or illegality or unconstitutionality in its inception, on account of a failure to comply with the conditions of the original grant or contract, and any such pleas shall be deemed good and valid in law in all such suits in this State.

And be it further ordained, That this ordinance shall be presented to the people for their adoption or rejection at the same time this Constitution shall be presented to them, and the returns of the votes taken on this ordinance shall be made to the office of the Secretary of State of the Republic of Texas at the same time the votes for the Constitution may be returned.

On motion of Mr. Lewis, the report of the special committee and ordinance were taken up.

Mr. Mayfield offered the following as a substitute to the ordinance of the special committee:

Be it ordained, etc., That all colonization contracts made by the Secretary of State or the President of Texas with any undertaker or contractor for the settlement or colonization of any portion of the unappropriated or vacant lands of the country, are declared voidable, and shall be suspended and cease from and after the adoption of this ordinance by the people of Texas. Nothing, however, herein contained shall be construed to limit or prejudice the rights to land of any actual settler or colonist living within the limits of any of said colonies, and who were introduced or emigrated under the provisions of said contracts: *Provided, always*, That the Legislature shall have power to pass laws defining the mode and manner by which said contractors may sue or be sued either for the purpose of recovering any indemnity to which they may be equitably entitled and ascertaining their respective rights to premium lands, or for the purpose of fully vacating and annulling any and all of said contracts.

Mr. Lipscomb offered the following amendment:

Strike out "or other description of grantee," which would leave it to the colonization contracts only.

Mr. Love made some remarks in favor of the amendment, and Messrs. Wright and Cunningham spoke in opposition to it.

Mr. JONES made some remarks, not heard by the reporter, and continued as follows:

I know something about these transactions at Montclova, and something about these eleven league grants. But because there has been fraud in some instances, would you rob those who have innocently acquired the title to their lands? Those who talk so much about these matters, in my opinion know very little about them, if I may judge from their arguments. I am unwilling, sir, for the sake of half a dozen individuals who may wish to steal lands, to be compelled to establish what I cannot—that I have complied with all the requisitions of the law. Because it is well known that it was danger-

ous, and in fact impracticable, to make the surveys required, and as to cultivating the lands, it was utterly impossible. I could perhaps, if necessary, give a full and accurate history of every description of land claims; but, on this occasion, I will only say that if these provisions or directions—for I do not know what to call them—shall be adopted and become a part of the Coustitution or an ordinance, I, as an individual who have been here since the year 1822, and have honestly acquired my lands, will never defend any suit which may be brought against me. Much has been said, and much beautiful argument advanced, in relation to the poor soldier who has waded through blood and all that, and it is perhaps calculated to have a wonderful effect upon the members of this body. I, sir, unfortunately, have none of this honor. I came at an early period, as early as 1822; I expended three-fourths of my labors for years in defending and protecting my adopted country. I can say what some gentlemen here know to be the fact, that there have been few campaigns in which I did not participate. But, unfortunately for myself, my health was such in '36 that I was not in the battle of San Jacinto or any other fight of that period. At the same time I had richly earned all the lands which I have acquired previously to 1836. If it should be the sense of the Convention to adopt a clause like this, which will sweep away my claims, I shall feel perfectly satisfied, and I pledge myself before God that I will not defend one of them.

Mr. YOUNG said: I am pleased with the candor of the gentleman last up. He is the first individual I have seen who would honestly admit that he owned an eleven-league claim. He tells you that if the ordinance passes, he, for one, will not contend for his claims. He tells you that he paid his money for them, and he tells you that there were conditions attached to them with which he had not complied, because, he said, he looked upon them as trash, many of them, and many of them were disagreeable, and he would not comply with them. Now he contends that he is willing to place his claims at issue under the laws of the Republic; and if he is able to find a law which will protect a claim when it goes beyond a league and labor, he has seen what I have not. He insists that you shall not place the actual settler upon the same footing that he himself is. After having declared that he himself had not complied with the conditions and restrictions annexed to his grant, he asks that he may be placed above the citizens who may chance to settle upon it. I ask if this is just? It is not my object, nor that of introducing this section, to interfere with any just and genuine claim. It is not the intention to interfere with claims amounting, perhaps, to four leagues for services rendered. As far as they are concerned, I have no objection to leaving them out of the question; but in relation to these eleven leagues, where they were granted for $200 a league, I do contend for a rigid performance of the conditions, or that they shall revert back to the State.

Mr. JONES said: The gentleman confirms me in the opinion I have expressed, that those who have said the most about these matters know the least. He says these claims were purchased for $200.

I say, sir, without fear of contradiction, that the government received much more for these claims. I wish it to be understood that the Legislature of Coahuila and Texas, the government being short of funds, authorized the Governor of the State to sell to Mexican born citizens certain quantities of land for the purpose of raising a revenue. The claim which I hold is but a part of an eleven-league claim; it was purchased of the citizen who received the grant and paid the government an amount which was satisfactory therefor. There may be certain conditions which have not been complied with, but the conditions are such as apply to every grant of land made from 1822 to 1836. I say again, I feel certain that there is not one individual who has complied with all the conditions of his contract. Many of them were nonsensical, and with some it was utterly impossible to comply. In many parts of the country not a rock was to be found for miles, and one of the conditions required the throwing of rocks, the pulling of grass, etc.

The ayes and noes were called upon the amendment, and stood as follows:

AYES—Messrs. President, Anderson, Baylor, Bache, Brashear, Brown, Caldwell, Cazneau, Clark, Cuney, Darnell, Everts, Forbes, Gage, Henderson, Hicks, Hogg, Horton, Howard, Holland, Hunter, Irion, Jewett, Jones, Love, Lumpkin, Lusk, Lipscomb, Mayfield, McGowan, Miller, Navarro, Parker, Power, Rains, Runnels, Scott, Standefer, Ochiltree and Van Zandt—41.

NOES—Messrs. Armstrong of R., Bagby, Burroughs, Cunningham, Evans, Latimer of L., Latimer of R. R., Lewis, McNeil, Smyth, White, Wright and Young—13.

So the amendment was adopted.

The question was then taken on the substitute of Mr. Mayfield.

Upon which the ayes and noes were called, and stood as follows:

AYES—Messrs. Anderson, Armstrong of R., Baylor, Burroughs, Caldwell, Clark, Forbes, Horton, Hunter, Jewett, Latimer of L., Latimer of R. R., Love, Mayfield, McNeil, Miller, Runnels, Ochiltree, Van Zandt and White—20.

NOES—Messrs. President, Bache, Bagby, Brashear, Brown, Cunningham, Cuney, Darnell, Evans, Everts, Gage, Henderson, Hicks, Hogg, Howard, Holland, Irion, Jones, Lewis, Lumpkin, Lipscomb, McGowan, Navarro, Parker, Power, Rains, Scott, Smyth, Standefer, Tarrant, Wright and Young—32.

So the substitute was rejected.

Mr. Mayfield then offered the following substitute:

The Legislature shall, at its first session, pass laws providing the mode and manner by which all colonization contracts heretofore made by the Secretary of State or President of the Republic of Texas with any undertaker or contractor for the settlement or colonization of any of the vacant or unappropriated lands of Texas, as well on account of their unconstitutionality, illegality, fraud or non-performance of said contracts, shall be vacated and fully annulled, and of extending to any of the said contractors the premium lands and rights to which they

may have been equitably entitled, but no laws shall be passed limiting or prejudicing the rights of those who may have emigrated or settled within said colonies by virtue of said contracts to the quantum of lands to which such emigrant or settler may have been entitled.

Mr. Ochiltree moved to amend by inserting after the word "Legislature" the words "if they deem it necessary."

Which was carried.

[Mr. Mayfield's substitute was rejected by a vote of 34 to 16.]

M. Caldwell moved to insert the word "such" before the word "suits," in the ordinance reported by the special committee.

On motion of Mr. Gage, the word "Republic" was inserted before the word "Texas," so as to read "President of the Republic of Texas."

Mr. Evans moved to strike out the last section of the ordinance.

Upon which the ayes and noes were called, and are as follows:

AYES—Messrs. Baylor, Caldwell, Cazneau, Evans, Hunter, Latimer of L., Mayfield, McNeil, Navarro, Runnels and Tarrant—11.

NOES—Messrs. President, Armstrong of R., Bache, Bagby, Brashear, Brown, Burroughs, Clark, Cunningham, Cuney, Darnell, Everts, Forbes, Gage, Henderson, Hicks, Hogg, Horton, Howard, Holland, Irion, Jewett, Latimer of R. R., Lewis, Lumpkin, Lusk, Lipscomb, McGowan, Miller, Power, Rains, Scott, Smyth, Standefer, Ochiltree, Van Zandt, White and Young—38.

So the amendment was lost.

On motion of Mr. Evans, the words "of the Republic of Texas" were inserted after the words "Secretary of State."

Mr. Evans moved to insert the words "and that this ordinance become a part of the Constitution of the State of Texas."

Upon which the ayes and noes were called, and stood as follows:

AYES—Messrs. Anderson, Armstrong of R., Baylor, Caldwell, Evans, Howard, Hunter, Jewett, Latimer of L., Latimer of R. R., Lumpkin, Lipscomb, Mayfield, McNeil, Runnels, Tarrant, White and Young—18.

NOES—Messrs. President, Bache, Bagby, Brashear, Brown, Burroughs, Clark, Cunningham, Cuney, Darnell, Everts, Forbes, Gage, Henderson, Hicks, Hogg, Horton, Holland, Irion, Lewis, Lusk, McGowan, Miller, Navarro, Power, Rains, Scott, Smyth, Standefer, Ochiltree and Van Zandt—31.

So the amendment was rejected.

Mr. Mayfield moved to amend by inserting the following:

"And all said contracts shall be suspended and cease from and after the institution of any suit or suits provided for by this ordinance, until the final decision and adjudication of the same."

Upon which the ayes and noes were called, and stood as follows:

AYES—Messrs. Baylor, Caldwell, Clark, Horton, Hunter, Jewett, Mayfield, McNeil, Tarrant, Van Zandt and White—11.

NOES—Messrs. President, Anderson, Armstrong of R., Bache, Brashear, Brown, Burroughs, Cunningham, Cuney, Darnell, Evans, Everts, Forbes, Gage, Henderson, Hicks, Hogg, Howard, Holland, Irion, Latimer of L., Latimer of R. R., Lewis, Lumpkin, Lusk,

Lipscomb, McGowan, Miller, Navarro, Power, Rains, Scott, Smyth, Standefer, Wright and Young—36.

So the amendment was rejected.

The question was then taken on the adoption of the ordinance reported by the special committee.

Upon which the ayes and noes were called and stood as follows:

AYES—Messrs. President, Bagby, Brashear, Burroughs, Caldwell, Cuney, Darnell, Everts, Forbes, Gage, Henderson, Hicks, Hogg, Howard, Holland, Irion, Lewis, Lumpkin, Lusk, Lipscomb, McGowan, Miller, Navarro, Ochiltree, Power, Rains, Scott, Smyth, Standefer, Wright and Young—31.

NOES—Messrs. Anderson, Armstrong of R., Baylor, Bache, Brown, Cazneau, Clark, Cunningham, Evans, Horton, Hunter, Jewett, Latimer of L., Latimer of R. R., Mayfield, McNeil, Runnels, Tarrant, Van Zandt and White—20.

So the ordinance was adopted.

No. 12.

ORDINANCE OF JULY 4, 1845.

Hartley, p. 47.

WHEREAS, The Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March, one thousand eight hundred and forty-five; and, whereas, the President of the United States has submitted to Texas the first and second sections of the said resolutions, as the basis upon which Texas may be admitted as one of the States of the said Union; and, whereas, the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows:

[Here follow the first and second sections of the resolution of the Congress of the United States, *vide* page 25.]

Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions, we, the deputies of the people of Texas in convention assembled, in their name, and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions, and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

Done at the City of Austin, Republic of Texas, July 4, 1845.

THOS. J. RUSK, President.

Phil. M. Cuney, H. G. Runnels, Robert M. Forbes, Sam. Lusk, Jno. Caldwell, Jose Antonio Navarro, Geo. Wm. Brown, Gustavus A. Everts, Lemuel Dale Evans, J. B. Miller, R. E. B. Baylor, J. S. Mayfield, R. Bache, James Love, Wm. L. Hunter, John D. Anderson, Isaac Parker, P. O. Lumpkin, Francis Moore, Jr., Isaac W. Brashear,

Alexander McGowan, Isaac Van Zandt, S. Holland, Edward Clark, Geo. W. Smyth, James Armstrong, John M. Lewis, James Scott, Archibald McNeil, A. C. Horton, Israel Standefer, Jos. L. Hogg, Chas. S. Taylor, David Gage, Henry J. Jewett, Cavitt Armstrong, James Power, Albert H. Latimer, Wm. C. Young, J. Pinckney Henderson, Nicholas H. Darnell, Emery Rains, A. W. O. Hicks, James M. Burroughs, H. L. Kinney, William L. Cazneau, A. S. Cunningham, Abner S. Lipscomb, John Hemphill, Van R. Irion, Volney E. Howard, E. H. Tarrant, Francis M. White, James Davis, George T. Wood, G. W. Wright, H. R. Latimer, W. B. Ochiltree, Oliver Jones, B. C. Bagby, Chas. Bellinger Stewart.

Attest: JAS. H. RAYMOND,
Secretary of the Convention.

No. 13.

ORDINANCE OF AUGUST 27, 1845.

Hartley, p. 84.

WHEREAS, Various contracts have been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas; and,

WHEREAS, It is believed that said contracts are unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upwards of seven millions of acres of the public domain of Texas, in the hands of a few individuals—when, in truth, the citizen soldiers and creditors of the Republic of Texas had, by the laws and Constitution of said Republic, a clear and indisputable previously subsisting right to locate upon the public domain thus attempted to be assigned to said contractors:

SECTION 1. *Therefore it is hereby ordained and declared*, That it shall be the duty of the Attorney-General of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas, and if upon such investigation it shall be found that any such contract was unconstitutional, illegal or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void: *Provided, however*, That all actual settlers under any such contract shall be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And in all suits brought by or against any contractors, or any person claiming under, by or through them, or either of them, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead, and the party

may introduce testimony to prove the claim or title to have been forfeited, as well for frauds, or illegality or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas shall be deemed good and valid in law, in all such suit or suits in this State.

SEC. 2. *Be it further ordained*, That the Legislature is hereby restrained from extending any contract for settling a colony, and from relieving any contractor from the failure of the conditions or the forfeiture accruing from non-compliance with the contract.

SEC. 3. *And be it further enacted*, That this ordinance shall be presented to the people for their adoption or rejection, at the same time that this Constitution shall be presented to them, and the returns of the votes taken on this ordinance shall be made to the office of the Secretary of State of the Republic of Texas at the same time the votes for the Constititution may be returned.

Adopted in Convention, this twenty-seventh day of August, one thousand eight hundred and forty-five.

THOS. J. RUSK, President.

Atttest:

JAMES H. RAYMOND, Secretary of the Convention.

No. 14.

ACT OF MAY 11, 1846.

Hartley, p. 104.

An Act defining the duties of the Attorney-General of the State of Texas.

ART. 77. [13] *Be it further enacted*, That it shall be the duty of the Attorney-General of this State to file the petition or information, and institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate.

No. 15.

ACT OF FEBRUARY 2, 1850.

Hartley, p. 702.

An Act for the relief of the citizens of Mercer's colony.

ART. 2309. [1] *Be it enacted by the Legislature of the State of Texas*, That every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the twenty-fifth of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to-wit, six hundred and forty

acres to each family, and three hundred and twenty acres to each single man over the age of seventeen years: *Provided*, That nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.

ART. 2310. [2] That the Governor, by and with the advice and consent of the Senate, shall appoint a commissioner, whose duty it shall be to hear proof and determine what colonists shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such parties, certificates for their proper quantity of land.

ART. 2311. [3] That the owners of said certificates may locate, transfer or donate the same, and exercise all rights of ownership over them.

ART. 2312. [4] That said certificates may be located on any vacant land within the limits of said colony not otherwise appropriated, as other headright certificates are located; and the same laws relative thereto shall govern the surveyors and other officers in the discharge of their official duties in relation to the surveying, recording, etc., of the same.

ART. 2313. [5] That no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent of the contractors, so that the boundaries thereof are justly and definitely marked.

ART. 2314. [6] That should the commissioner appointed under the second section of this act fail or neglect to act, or should the office in any manner become vacant, the Governor is hereby authorized and required to fill such vacancy by appointing some competent person to perform the duties herein required as soon as practicable.

ART. 2315. [7] That the commissioner appointed in compliance with this act shall receive two dollars for each certificate issued, to be paid by the party receiving the same; and said commissioner shall do and transact the business and duties required of him at the different county seats of each and every county within the limits of said colony.

ART. 2316. [8] That to entitle the colonists to the benefits of this act, they shall be required to prove by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to the twenty-fifth of October, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither: *Provided*, That they shall not be required to prove that they have cultivated land.

ART. 2317. [9] That to entitle the heirs and legal representatives of such citizens as have died subsequently to their citizenship, within the limits of said colony, to the benefits of this act, the proof and requirements shall be the same as in the foregoing, except the oath; instead of which there shall be substituted the oath of the heirs and

legal representatives of such citizens, testifying to the best of their knowledge and belief to the truth of the facts herein required to be proven.

ART. 2318. [10] That upon the presentation of said certificate, with the proper field notes of the surveyor, made in accordance with the law, the Commissioner of the General Land Office shall issue the patents accordingly, to all who may be entitled to the same.

ART. 2319. [11] That it shall be the duty of the commissioner appointed by virtue of this act to send to the Commissioner of the General Land Office a monthly list, under oath, containing a description of certificates issued in compliance with this act; and he shall also keep a record in a well-bound book, showing the quantity of land for which each certificate issued, the names of the parties obtaining the same, and the names of the witnesses who made the proof; and said commissioner shall deposit said record book in the General Land Office, at the expiration of the time limited in this act for granting certificates.

ART. 2320. [12] That the commissioner appointed by virtue of this act, before he enters upon the duties of his office, shall give bond in the sum of twenty thousand dollars, with security to be approved by the district judge of the ninth judicial district, which bond shall be drawn payable to the State of Texas, and shall be conditioned that the commissioner shall faithfully and impartially discharge the duties imposed on him by this act; and shall also take the oath required by the Constitution, which oath shall be endorsed on the said bond, and with the same shall be deposited in the office of the Secretary of State.

ART. 2321. [13] That said commissioner shall continue to perform the duties imposed on him by this act for and during the term of eighteen months from and after his appointment as aforesaid, and no longer.

ART. 2322. [14] That in case the claim of any individual be rejected by said commissioner, such claimant shall have the right to appeal to the District Court of the county where he or she applied, under the rules and regulations governing appeals from Justices' Courts to the District Courts, except that the appeal bond be required only to cover the costs of appeal; and in case the judgment be affirmed, the appellant shall pay all costs; and in case the judgment be reversed, the claimant shall be entitled to a certificate from the clerk of the District Court, for which he shall pay to the clerk of the court two dollars; which certificate shall entitle the owner to all the right to which he would have been entitled under a certificate from the commissioner aforesaid.

No. 16.

ACT OF CONGRESS U. S., SEPTEMBER 9, 1850.

U. S. Statutes, p. 446.

An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas: *Provided,* The said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

First—The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

Second—The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Third—The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Fourth—The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Fifth—Immediately after the president of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the

treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States: *Provided*, That nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March 1, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise.

No. 17.

ACT OF NOVEMBER 25, 1850.

Paschal's Digest, p. 193.

An Act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by her Exterior to said Boundaries and of all her Claims upon the United States, and to Establish a Territorial Government for New Mexico.

ART. 443. WHEREAS, Said propositions are contained in the first section of said act in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States and upon the said State of Texas: *Provided*, The said agreement by the said General Assembly shall be given on or before the first day of December, eighteen hundred and fifty:

ART. 444. [1] The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of north latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

ART. 445. [2] The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

ART. 446. [3] The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom houses, custom house revenue, arms and muni-

No. 16.

ACT OF CONGRESS U. S., SEPTEMBER 9, 1850.

U. S. Statutes, p. 446.

An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas: *Provided*, The said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

First—The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

Second—The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Third—The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Fourth—The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Fifth—Immediately after the president of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the

treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States: *Provided*, That nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March 1, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise.

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ART. 443. WHEREAS, Said propositions are contained in the first section of said act in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States and upon the said State of Texas: *Provided*, The said agreement by the said General Assembly shall be given on or before the first day of December, eighteen hundred and fifty:

ART. 444. [1] The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of north latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

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tions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

ART. 447. [4] The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half yearly at the treasury of the United States.

ART. 448. [5] Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided,* That nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise;" therefore,

ART. 449. [1] That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

ART. 450. [2] That the Governor of this State be, and he is hereby, requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress.

No. 18.

ACT OF JANUARY 24, 1852.

Pamphlet Laws, Chapter lxv., p. 35.

An Act for the Relief of the Settlers in the Territory commonly known as Mercer's Colony.

SECTION 1. *Be it enacted by the Legislature of the State of Texas,* That the Commissioner of the General Land Office is hereby required to issue patents upon all surveys made by virtue of certificates issued to settlers as colonists in the territory commonly known as Mercer's

Colony, under the same terms and conditions as required by law in other cases: *Provided*, That no such certificate shall be located without the limits of the territory generally known as Mercer's Colony, prior to the rendition of the decree of twenty-eighth day of October, A. D. eighteen hundred and forty-eight, by the District Court of Navarro county: *Provided*, That nothing contained in this act shall be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract or rights growing out of the same.

SEC. 2. That this act shall take effect from its passage.

Approved January 24, 1852.

No. 19.

ACT OF FEBRUARY 16, 1852.

Pamphlet Laws, p. 136.

An Act Supplementary to and Amending an Act for the Relief of Citizens of Mercer's Colony, of date February 2, 1850.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That section eight of the above recited act be so amended that it shall only be necessary for the colonists applying for lands to prove that they were resident citizens of said colony January 29, 1849, but in all other respects they shall fully comply with the provisions of said eighth section of said act.

SEC. 2. That the proof required by the first section of this act shall be made before the District Court of the county in which the party resided January 29, 1849; and it shall be the duty of the District Court to hear and determine, and award or refuse certificates to the parties applying under the provisions of this act, and the act to which this act is supplementary, in the same manner as the commissioner appointed under said act might or should have done under the same.

SEC. 3. That no petition shall be required, and it shall only be necessary for the clerk of said court, upon the application of the party desiring to avail himself of the provisions of this act, to enter the name of the applicant on his docket, and the said application shall be heard in its order as other cases upon the docket, unless the court shall appoint some particular day of the term for hearing the same.

SEC. 4. That the certificates for the claims established under this act shall be issued by the clerk and be countersigned by the judge of the court issuing the same, and of the issues of said certificates the clerk shall make monthly returns to the Commissioner of the General Land Office; in no case shall the clerk's fees be more than three dollars, and he shall be entitled to said fees from the applicant should he fail or succeed in his application.

SEC. 5. That the provisions of the act for the relief of the citizens of Mercer's colony of effect March 23, 1850, shall apply and be of

force in regard to all rights sought to be established, and all certificates issued under the provisions of this act, except in the amendment provided for by the first section of this act: *Provided*, Not more than twenty certificates shall be proven up.

SEC. 6. That this act take effect from and after its passage.

Approved February 16, 1852.

No. 20.

ACT OF JANUARY 21, 1854.

Pamphlet Laws, p. 9.

An Act supplementary to An Act supplementary to and amending "An Act for the relief of the citizens of Mercer's Colony," of date February second, eighteen hundred and fifty.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March twenty-third, eighteen hundred and fifty, shall apply and be in force in regard to all rights sought to be established, and all certificates issued under the provisions of the act to which this is a supplement: *Provided*, That no certificate shall be granted or issued under the provisions of this act, or the act to which this is a supplement, unless the applicant shall make all the proof required by the above recited act, and shall also prove, by his or her own oath, supported by the oath of two respectable witnesses, that he, or his or her ancestors or decedents, as the case may be, emigrated to and settled within the limits of the territory commonly known as Mercer's Colony, on or before the twenty-ninth day of January, A. D. eighteen hundred and forty-nine; and should any certificate be obtained by fraud or perjury, or otherwise than according to the true intent and meaning of this act, such certificate, and the patent issued thereon, shall be utterly void.

SEC. 2. That the fifth section of an act supplementary to and amending an act for the relief of the citizens of Mercer's Colony, of date sixteenth of February, eighteen hundred and fifty-two, be and the same is hereby repealed; and that this act take effect from and after its passage.

Approved January 21, 1854.

No. 21.

ACT OF DECEMBER 17, 1857.

Pamphlet Laws, p. 21.

An Act to repeal an Act Supplementary to an Act for the Relief of the Citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That an act supplementary to an act for the relief of the citizens of Mercer's colony, passed February 2, 1850, approved August 30, 1856, be and the same is hereby repealed: *Provided*, That the passage of this act shall not in any way affect the right of parties who have received certificates for land from any district court under the provisions of the act hereby repealed.

SEC. 2. That this act take effect and be in force from and after its passage.

Approved December 17, 1857.

No. 22.

OPINION OF JUDGE W. D. WOODS, FILED APRIL 19, 1879, ON DEMURRER TO COMPLAINANT'S ORIGINAL BILL, ETC.

U. S. Circuit Court, Western District of Texas.—George Hancock, devisee, v. Wm. C. Walsh, Commissioner of the General Land Office of Texas.—In equity. Heard on demurrer to the bill and on motion for injunction *pendente lite*.

The original bill was filed on March 6, 1875, by George Hancock, a citizen of Kentucky, against J. J. Gross, who, at that time, was Commissioner of the General Land Office of the State of Texas.

After the filing of the original bill, to-wit, on August 27, 1875, Hancock, the complainant, died, and the suit was revived in the name of William Preston, his devisee, upon a bill of revivor, filed January 26, 1876.

Afterwards Gross, the defendant, died, and on April 12, 1879, a bill of revivor and of supplement was filed against William C. Walsh, his successor in office, who entered his appearance and filed his demurrer to the original and supplemental bills.

The case made by the original and supplemental bills was as follows:

The Republic of Texas, after establishing her independence, adopted substantially the colonial policy, commenced in 1825 by the government of Mexico, to induce the settlement and colonization of its lands in Coahuila and Texas. Several acts of the Congress of the Republic were passed to carry out this policy. By authority of these acts, thirteen colonial contracts were entered into by the Republic of Texas, through the agency of its President, with various colonial contractors. Among these contracts was one made on January 29, 1844, between Samuel Houston, President of the Republic of Texas, and Charles

Fenton Mercer, a citizen of Florida, and such associates as he should choose, the original of which is on file in the State Department of the State of Texas. By the terms of this contract, it was stipulated that Mercer should, within five years from the date of the contract, settle upon so much of the public domain of Texas as was designated in the contract as Mercer's colony, and described by metes and bounds, as many emigrant families as he and his associates could induce to move thereon, at the rate of one family for every section of one square mile of vacant and unappropriated land, with the proviso that at least one hundred families should be settled on said lands during every year of the term of five years for which the contract was to run.

In consideration of the performance by Mercer and his associates of their part of the contract, the Republic of Texas agreed to convey to Mercer and his associates one section of 640 acres of land for every family that they should introduce and settle upon said lands, and to make a full and perfect title therefor to him and his associates as soon as they should exhibit to the proper officer the evidence that said families had been settled on the lands embraced within the limits of the colony, and as a premium and recompense for their labor and expenditures in the performance of the contract, the Republic of Texas agreed and covenanted to give, grant and convey to Mercer and his associates, or their legal representatives, one section of 640 acres, or two half sections of 320 acres each, for every one hundred families introduced and settled by them on said lands in pursuance of the contract.

Mercer at once entered into possession of said lands, and surveyed and occupied the same by his agents and colonists in conformity with the provisions of the contract, and did manage and control the same as proprietor thereof, and, in order to perform the contract on his part, and as authorized by the contract itself, at once organized a joint stock company, which was called "The Texas Association," composed of many men of wealth and character, and he and his associates in said company, in compliance with the stipulations of their contract, gave their time, labor and services to establish said colony, and did introduce and settle upon said lands not less than one hundred families in each and every year of the five years for which said contract was to run, and well and truly performed all the covenants by them to be performed under the terms of the contract, and for the accomplishment of these ends they subscribed and paid money exceeding twenty thousand dollars. Twelve hundred and fifty-six families were in fact introduced and settled within the limits of the said colony within five years after the date of the contract by Mercer and his associates, which, under the terms of the contract, would have entitled them to 1356 sections of land of 640 acres each.

On January 29, 1849, the date at which said term of five years expired, Mercer and his associates offered to exhibit to the Commissioner of the General Land Office of Texas proof of the facts above recited, to-wit, of the introduction and settlement of said families, and did in fact make a report, which is now on file in the General Land Office of

Texas, giving the number and names of the colonists and families introduced and settled by them within the limits of the colony, verified by affidavit, and with the names of the required witnesses attesting and verifying all the facts therein stated, and showing the strict performance by Mercer and his associates of the covenants in said contract by them to be performed.

The contract between Mercer and the Republic of Texas further provided, that lands lying within the limits of the Mercer colony which had not been legally located prior to the date of the contract, should be held subject to be settled by Mercer and his associates for the period of five years, and should be set apart from the public domain and kept free from all future locations and claims to be colonized in the manner specified in the contract, for the use and benefit of Mercer and his associates.

At the date of said contract the Republic of Texas was seized in sovereign demesne of all the lands within the limits of the grant to Mercer, and by her statutes held out the promise that in all contracts for colonization an immediate equitable title should vest in the contractor, subject to be divested only upon the non-performance by him of the conditions annexed to the grant. The statutes and contract taken together created a trust whereby the State, retaining the legal title, empowered and required her proper officers to convey the legal title to the contractor as soon as evidence was produced of the performance of the contract by him.

Yet, notwithstanding the premises, the former Commissioner of the General Land Office of Texas proceeded to issue certificates for lands within the colony of Mercer to all persons holding general certificates of location, and to issue patents therefor, and the defendant Walsh continues to issue patents upon surveys made within the limits of the colony, in violation of said contract.

By reason of the performance by Mercer and his associates of the terms of the said contract, they became entitled to have and receive a full and perfect title to 1256 sections of land within the boundaries of said colony, and also 120 sections of premium lands, being ten sections for every hundred families introduced by them and settled in said colony. Full evidence was adduced, and is of record in the archives of the General Land Office of the State of Texas, that 1236 families, claiming and holding under said Mercer, were introduced and settled by him upon lands lying within the limits of said colony according to the terms of said contract.

The State of Texas has recognized the constitutionality and binding force of said contract by the decisions of her Supreme Court, and by the issue to the colonists under Mercer of 1256 patents for land in said colony, whereby the title to said 1256 sections was conveyed to the said colonists.

There are more than one million acres of land lying within the limits of Mercer's colony which have never been located and patented, but remain vacant and are subject to the terms of the contract between the Republic of Texas and Mercer, and should in equity be re-

served for the fulfillment of said contract, and under the statutes of the State of Texas it is the duty of the Commissioner of the General Land Office to issue to complainant and his associates certificates for the lands to which the said contract entitles them.

The joint stock company known as "The Texas Association," which was formed under said contract between the Republic of Texas and the said Mercer, had authority, under the terms of said contract, to name one or more trustees to act for said association, and said association did appoint the said Mercer sole trustee, with full authority and power to bind the association and act for it in the premises.

Mercer accepted the said trust and continued to discharge the duties of trustee until the year 1852, when he sold and assigned his interest in the property of the association to said George Hancock, who was thereupon duly appointed and chosen trustee and chief agent of the association in the place of Mercer, and invested with all the powers of such trustee and agent, and said Hancock continued to act as such trustee and agent up to the filing of the bill in this case, and afterwards to the time of his death.

The said George Hancock, soon after the sale to him by Mercer of his interest in said contract, came to the State of Texas, and found the rights of other colonial contractors under discussion in the Legislature and in litigation in the courts. He was advised that there would be an equitable adjustment of all colonial contracts, including that of Mercer, and was for that reason requested by his associates to await the action of the State, and confide in its justice. He did so, and urged the claims of himself and associates under said contract upon the officers of the State. He was then delayed till 1858, when the Supreme Court of Texas decided in favor of the constitutionality and validity of said contract between the Republic of Texas and Mercer. Soon after the war of rebellion broke out, which made it impossible for him, during its continuance, to assert his rights. Recently he has constantly petitioned the Legislature of the State for redress, but has never received any relief.

After the appointment of said Walsh as Commissioner of the General Land Office of Texas, the present complainant gave him notice in writing of the rights of the Texas Association and of complainant, and requested him not to issue any land certificates or patents for lands within the limits of the Mercer colony. Said Walsh refuses to comply with such request, and threatens to continue, and has continued, and still continues, to issue certificates and patents for lands within the Mercer colony to persons not claiming under or in privity with the contract of Mercer.

At the same time the present complainant demanded of defendant Walsh, Commissioner of the General Land Office, that he should issue to complainant, as chief agent of the Texas Association, certificates for 1376 sections of land, according to the terms of said contract, but Walsh refused and still refuses to comply with such demand, and refuses to deliver to complainant any land certificates whatever. No land certificate or patent for land has ever been

issued either to Mercer, Hancook, the Texas Association, or the complainant, for lands to which they were entitled under said contract.

George Hancock, the successor as trustee and chief agent of the Texas Association of the said Charles Fenton Mercer, by his last will and testament appointed the present complainant, William Preston, to act as trustee and chief agent of the Texas Association, to maintain and prosecute its claims under said contract or any suit based thereon, to revive the same, and to do all things which the said Hancock uuder the said agreement of association and contract might do, and did devise and bequest to said William Preston all his right, title and interest in and to the estate, stock and property of said Texas Association.

Complainant accepted said trust, and he is now chief agent and trustee of the Texas Association, and has been and is recognized as such by the association and the members thereof.

In the Convention which assembled July 4, 1845, to frame a Constitution for the State of Texas preparatory to her admission as one of the United States of America, attempts were made to declare colonial grants and contracts, including the Mercer contract, to be null and void *ab initio*. All such propositions were defeated, and no clause making such declaration was inserted in the Constitution, but an ordinance adopted by the Convention declared that the Legislature should provide for proceedings in the courts, by the Attorney-General or district attorneys, to test the constitutionality, legality and good faith of all colonization contracts, including Mercer's, entered into by the Republic of Texas, and to decide whether the conditions of said contracts had been performed by the contractors.

The Legislature of Texas has never made any such provision of law as contemplated by the ordinance of 1845, although Mercer and Hancock and the Texas Association have made repeated applications for the passage of such an act, whereby they could assert and vindicate their rights in the courts.

All colonial contracts made by President Houston for the Republic of Texas, except the contract with Mercer, have been adjusted and settled by the State of Texas, either by agreement of the contractors with the State or by judicial proceedings authorized by special legislation for the particular case.

The joint resolutions of the Congress of the United States providing for the admission of Texas as one of the States of the Union declared that the State of Texas should retain all the unappropriated lands within her borders, to be applied to the payment of the debts and liabilities of the Republic of Texas, and the Convention of 1845, which framed a Constitution for the State of Texas, recognized, and in effect admitted, that the contract of Mercer was one of the liabilities of the Republic.

On February 3, 1845, the Republic of Texas, by legislative act, required Mercer and his associates to have the lines of their colony actually surveyed and marked by the first day of April, 1845, and notwithstanding the great difficulty and expense of making such sur-

vey within so short a time, the same was accomplished and marked before the time limited by the act of Congress.

Neither Mercer nor his associates, nor Hancock, nor the present complainant, have ever abandoned or failed to assert their rights under said contract, but have continually set up the same openly and publicly, and in all ways open to them have asserted the validity of said contract and the full performance of its conditions by said Mercer and his associates.

Such were in substance the averments of the original and supplemental bills.

The original bill prayed for an injunction restraining the defendant and his successors in the office of Commissioner of the General Land Office of Texas from allowing any location or survey of lands lying within the limits of the Mercer colony not yet patented, and from issuing any patent or grant of land within said limits, except to complainant or the Texas Association, and from doing or suffering to be done any act whereby such lands may be located, surveyed or patented to any other person or persons except complainant, to be held by him in trust for the Texas Association. The bill also prayed general relief.

To the original and supplemental bills demurrers were filed on the following grounds:

1. Because the suit is in effect a suit against the State of Texas, and seeks to deprive the State of the right and power of disposing in her own way of her own public lands.

2. That if complainant is entitled to any relief, it must be sought through the political department of the government of the State of Texas.

3. That the case made by the bills does not entitle the complainant to the relief prayed.

4. That the claim is barred by lapse of time.

5. That defendant is an executive officer of the State of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law.

6. The bill is not sworn to.

7. This court is without power to restrain or enjoin him, he being an executive officer of a sovereign State.

8. That the acts of defendant complained of in the bill involves the exercise of official discretion, and are not merely ministerial acts, and he cannot therefore be enjoined.

9. The bill shows that defendant cannot refrain from patenting the lands mentioned without violating an official duty.

10. The bill shows that no injury can come to the complainant pending the suit.

At the hearing of the demurrer counsel for complainant moved for an injunction *pendente lite*, according to the prayer of the bill. The demurrer and motion were argued at the same time.

[With the foregoing statement of the case, as made by his honor, he proceeds:]

This is not a suit against the State of Texas. In the case of Osborn v. The Bank of the United States, 9 Wheat., 738, it was held that "in deciding who are parties to the suit, the court will not look beyond the record; that making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest, and that a State can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case."

The doctrine of this case was approved in the later case of Davis v. Gray, 16 Wall., 203. See also Dodge v. Woolsey, 18 How., 331; The State Bank of Ohio v. Kemp, 16 How., 369; Ohio Life and Trust Company v. Debolt, 16 How., 432; The Mechanics' and Traders' Bank v. Debolt, 18 How., 380; and the Jefferson Branch Bank v. Skelly, 1 Black., 436.

This suit is brought not against the State, but against an officer of the State, who it is alleged without the authority of any valid law of the State is by an unwarranted assumption of power so using his official position as to invade the rights secured to complainant by the Constitution and laws of the United States. This is the very case put by the Supreme Court of the United States in Osborn v. The Bank of the United States, *supra*, where it is decided that a Circuit Court of the United States may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States when such execution will violate the rights of complainant. To the same effect are the cases of Davis v. Gray, *supra*, and Board of Liquidation v. McComb, 2 Otto, 541.

It appears from the bill that Mercer concluded with the Republic of Texas a contract of colonization; that he performed its conditions; that rights have accrued to him and his associates; that these rights have been ascertained and fixed as to quantity and character; that he and his associates have a vested interest in the lands described in the contract, and that the State of Texas now holds the nominal legal title only; and that the defendant is violating his official duty as land commissioner by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates.

Is it within the power of the State of Texas to disregard the contract made by Mercer with the Republic of Texas? If it is not, then, if the Commissioner of the General Land Office is invading the rights of Mercer or his successors under the contract, either within or without the apparent authority of the Legislature, his acts should be restrained by this court.

The Supreme Court of Texas, in the case of Melton v. Cobb, 21 Texas, 530, has held that the contract of the Republic of Texas with Mercer was a valid contract. The court in that case declares the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was therefore binding upon the Republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an

obligation on the part of the Republic to convey the legal title to the lands as soon as the conditions had been performed. It was a liability of the Republic which held the title to lands which it had contracted to convey and for which the consideration has been paid in full. It was as complete and binding a liability as a sovereignty could assume.

And the debates in and action of the Convention of 1845 convened to frame a Constitution for the State of Texas show that these colonial contracts, including Mercer's, were regarded as liabilities of the Republic. (See Debates of the Convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.)

Now, what is the relation of the State of Texas to this liability? By the first of the joint resolutions passed by the Congress of the United States for annexing Texas to the United States (5 Statutes at Large, 797), it was declared that "Congress doth consent that the territory properly included within and rightly belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, adopted by the people of said Republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

The second of said joint resolutions declared: "That the foregoing assent of Congress is given upon the following conditions, to wit: * * *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * and all other means pertaining to the public defense, belonging to the Republic of Texas, shall retain all her public funds, debts, etc.; * * and all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of the Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct, but in no event are said debts and liabilities to become a charge upon the government of the United States."

These resolutions, on July 4, 1845, were accepted by an ordinance, which passed the Convention with but one dissenting vote, which was signed by every member of the Convention, and which, after reciting the resolutions, declared: "Done in order to manifest the assent of the people of this Republic, as required in the above recited portions of said resolutions; we, the deputies of the people of Texas, in Convention assembled, in their name and by their authority, do ordain and declare that we assent to and accept the proposal, conditions and guarantees contained in the first and second resolutions of the Congress of the United States aforesaid." (Hartley's Digest, 44–47.)

On the faith of the acceptance of these resolutions Texas was admitted as a State into the Union of States.

Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions?

It seems to me to be clear that it is not.

The passage of the resolutions by the Congress of the United

States, and their acceptance by the deputies of the people of Texas, constituted either a treaty or a contract. It probably cannot be considered as a treaty, because it was not made by the President, by and with the advice and consent of two-thirds of the Senators present, as prescribed by section 20, article 2 of the Constitution, unless the long acquiescence of all departments of the Government gives it the force and effect of a treaty. Whether it be a treaty or a contract, it is alike within the clause of the Constitution of the United States which forbids a State from impairing the obligation of contracts. (Green v. Biddle, 8 Wheat., 92.) If it is to be considered a treaty, it is protected by the second clause of Article VI. of the Constitution of the United States, which declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

If this is a treaty, the Legislature of Texas can no more repeal or annul it than it can repeal or annul a clause in the Constitution of the United States.

If it is to be considered as a contract, it is equally beyond the power of the Legislature; for a State is as much forbidden by the Constitution from passing laws to impair the obligation of contracts made by herself as by other parties.

By no device that a State can resort to can she escape this constitutional prohibition. It is perfectly clear that she cannot authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the State of Texas may be enjoined from invading his rights by a disregard of the contract made by the State of Texas, on the faith of which she was admitted as a State of the Union.

The State of Texas has never expressly repudiated the contract made with Mercer. On the contrary, it has been pronounced valid and binding by her Supreme Court, as we have seen. (Melton v. Cobb, *supra*.)

The act of the Legislature of Texas of February 2, 1850 (Hartley's Digest, 702), is the only act to which we have been referred that gives authority to any one to issue certificates to be located within the Mercer colony, and those were to be issued not generally, but only to settlers in the colony who were entitled to lands under the Mercer contract, and not by the Commissioner of the General Land Office, but by a special commissioner appointed by the Governor, who was required to hear proof and determine what colonists were entitled to the lands. This is a recognition rather than a repudiation of the contract.

There is no act of the Legislature of Texas directly imposing upon the Commissioner of the General Land Office the duty of issuing certificates for location within the Mercer colony, and if there were it would be null and void.

Nor have we been referred to or have we been able to find any

act which clothes the Commissioner of the General Land Office with judicial or *quasi* judicial functions in regard to the issue of certificates and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that by reason of the facts stated in the bill the State of Texas became a trustee for him and his associates, seems to be well taken.

A State may become a trustee. (Perry on Trusts, Sec. 41.)

The contract between the Republic of Texas and Mercer was a grant of lands to Mercer upon a condition subsequent, which, according to the averments of the bill, were performed. The legal title remained in the Republic, which thereby became a trustee for Mercer and his associates. (3 Washburne on Real Property, 3d Ed., side page 525, *et seq.*)

On the execution of the contract Mercer took a vested estate, defeasible only on the non-performance of the conditions.

This trust imposed upon the Republic of Texas was not extinguished by the formation of the State of Texas and her annexation to the Union, but was imposed and fastened upon the State as the sovereign successor of the Republic. (New Orleans v. United States, 10 Peters, 736; United States v. Smith, 10 Peters, 331, 335; United States v. Arredondo, 6 Peters, 691; Lessees of Pollard's Heirs v. Kibbe, 14 Peters, 390.)

The State of Texas therefore is in the same plight as regards the rights of Mercer and his associates as the Republic was, and holds the relation to them of trustee to *cestui que* trust.

We have already seen that the State of Texas by her own express consent, given in the most solemn manner, agreed to hold the public domain of the Republic, and apply it to the extinguishment of the liabilities of the Republic. She therefore became a trustee for the parties to whom the Republic was liable, not only by operation of law, but also by her own express contract.

This is an express trust, which is defined to be a trust created by instruments that point out directly and expressly the property, persons and purposes of the trust. (Perry on Trusts, Sec. 24.)

If the State were therefore a party to this suit, it would not be competent for her to set up lapse of time or any defense analagous to the statutes of limitations to protect her from being called on to execute the trust. For as between trustee and *cestui que* trust, in the case of an express trust, such as this, the statute of limitations has no application, and no length of time is a bar. (Perry on Trusts, Sec. 863, and cases cited.)

Much less can an officer of the State, who, according to the averments of the bill, is, by his acts done without warrant of any valid law of the State, invading the rights of the beneficiaries of a trust assumed by the State, plead the lapse of time against the enforcement of the trust.

But even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the

averments of the bill offer reasonable excuse for the delay in bringing the suit, and it is the law of this State that when such excuse is offered the court will not apply the limitation. (McKin v. Williams, 48 Texas, 89.)

It is objected that the bill is not sworn to. The want of verification of the bill is not ground of demurrer. If the bill is not sworn to, the court will not allow an injunction to go unles its averments are sustained by evidence. The laws of Congress of the Republic and of the State of Texas and the facts of public history, of all of which the court takes judicial notice, and the exhibits to the bill, sufficiently establish its averments.

The foregoing discussion has covered all the grounds of demurrer, and in the opinion of this court none of the grounds are well taken.

This is not a suit against the State, nor does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which the complainant seeks to appropriate are not the property of the State.

The relief sought by the bill may be properly granted by a court of the United States, and the complainant is not compelled to seek his rights through the political department of the State government, to which he and his predecessors have, according to the bill, repeatedly appealed in vain.

The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorized the defendant to disregard the contract of the State is null and void, and therefore is not binding law.

If the defendant is violating the provisions of a contract protected by the Constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of the State, and no claim that defendant is performing an official duty will avail.

The averments of the bill make a case of the highest equity, which imperatively demands the interference of this court to prevent irreparable injury to complainant and his associates. The complainant seeks to enforce an express trust, which no lapse of time can render stale.

The case seems to run on all fours with the case of Davis v. Gray, 16 Wall., *supra*, which went up from this district, and in which the Governor of the State and the Commissioner of the General Land Office were enjoined from issuing patents for lands within the territory granted by the State of Texas to the Memphis and El Paso Railroad Company.

The conclusion seems to be inevitable that the demurrer must be overruled, and that the injunction should go as prayed in the bill. And it is so ordered. W. B. Woods, *Judge*.

No. 23.

INTERLOCUTORY DECREE OF JUDGE WOODS AWARDING INJUNCTION PENDENTE LITE.

In the Circuit Court of the United States for the Fifth Circuit and District of Western Texas, at Austin.—No. 98. George Hancock v. J. J. Groos, Commissioner of the General Land Office of the State of Texas.—In Equity.

And now, on this nineteenth day of April, A. D. 1879, this cause came on to be heard upon the several demurrers of the defendants herein to the bill of complaint; and the same having heretofore been argued by the counsel for complainant and defendant, and the court being now fully advised in the premises, it is now here by the court ordered, adjudged and decreed, that the several demurrers of the defendant herein to the bill of complaint be and they are severally overruled.

And on the same day, to-wit, the nineteenth day of April, A. D. 1879, this cause coming on further to be heard upon the motion of complainant by his solicitors for an injunction *pendente lite* against the defendant, as prayed for in the bill of complaint and bill of revivor and supplement herein; and reasonable notice having been served upon the defendant, W. C. Walsh, of the time and place when and where the said motion would be made; and the solicitors of complainant and defendant having appeared at said time and place, and having argued said motion in the hearing of the court, and the court having seen and considered the bill of complaint and the bill of revivor and supplement herein, and also the several exhibits therewith filed and referred to in support of said motion, and also the affidavits filed in support of said motion, and the court being fully advised in the premises, it is now here further ordered, adjudged and decreed as follows, to-wit:

That a writ of injunction do issue out of this court, and under the seal thereof, directed to W. C. Walsh, Commissioner of the General Land Office of the State of Texas, his clerks, draftsmen, subordinates, agents, servants and employees, and all his successors in office, and all their clerks, draftsmen, subordinates, agents, servants and employees, and all officers or agents subordinate to him, or to any of his successors in office, or under the direction, supervision or control of him, or of any of his successor or successors in office, enjoining him and them, and each and every of them, from issuing or delivering, or causing to be issued or delivered, or permitting to be issued or delivered, to any person or persons or corporation, any plat or plats with a view of making locations within said colony limits, certificate or certificates, patent or patents, for any lands or land within the boundaries of Mercer's colony, as set forth in the bill of complaint and the exhibits therewith filed, and therein defined, and from any further interference with or infringment of the land grant or land reservation known as Mercer's colony, and from doing or causing to be done any act or thing whereby there may issue any patent, certificate, plat

or grant of any lands within the boundaries of said Mercer's colony, as defined and set forth in the said bill of complaint and exhibits therewith filed, and as set forth in the copy of the contract made on the twenty-ninth January, 1844, by and between the Republic of Texas, by Sam Houston, President thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of State of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas, except to the complainant, William Preston, until the final hearing of this cause. And time is given the defendant until the June rules, 1879, to answer the bill herein.

W. B. Woods, *Judge.*

April 21, 1879.

No. 24.

OPINION OF JUDGE DON A. PARDEE ON FINAL HEARING.

(*As published in Austin Daily Statesman, January* 29, 1882.)

United States Circuit Court—William Preston v. Wm. C. Walsh, Commissioner of th General Land Office—In Equity. On the merits.

Justice Field, on the Ninth Circuit, in the case of Cole Silver Mining Company v. The Virginia and Gold Hill Water Company, reported in 1 Sawyer, 685, refused to hear questions of law previously determined by the Circuit Judge in the same case, saying:

"The circuit judge possesses equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded or be open to review by the other judge in the same case."

This proposition, so evident upon its face, acquires greater force when the circuit judge is called upon to consider the rulings of the circuit justice in the same case. (Sec. 2, Fisher's Pat. Cases, p. 120.)

This case has been before this court for hearing upon demurrer and for injunction *pendente lite*, and was heard and decided by my predecessor, Judge Woods, now circuit justice of this circuit. Justice Woods' decision covers many points, is full and elaborate, and is reported by himself in 3 Woods, 351.

The points decided, as stated by the judge himself, are:

1. This suit so far as it seeks to restrain the defendant's action, is not a suit against the State of Texas.

2. The colonization contract made by the Republic of Texas, acting by Samuel Houston, President, on January 29, 1844, with Charles Fenton Mercer, was valid and binding on the Republic.

3. By the terms of the joint resolution of the Congress of the United States for the annexation of Texas as a State in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant and unappropriated lands within her limits, to be applied to

the payment of the debts and liabilities of the Republic of Texas. This resolution having been assented to by the Convention of Texas, it is not within her power to refuse compliance with its conditions.

4. Whether the resolution of annexation and its acceptance by Texas is to be considered as a treaty or contract, it is equally binding on the State, and she cannot escape from its obligations.

5. A State may become a trustee.

6. A trust assumed by the Republic of Texas was not extinguished by the formation of the State of Texas, and the annexation to the United States, but was fastened upon the State as the sovereign successor of the Republic.

7. Neither the lapse of time, nor any defense analagous to the statutes of limitation, can be set up by the trustee of an express trust as a defense to his liability to execute the trust.

An examination of the full opinion will show that each of these propositions is fully decided upon reason, and sustained by authority, as well as many other questions not stated in the syllabus.

So far, then, as any of these questions now come up for consideration in determining the rights of the parties now before the court, they must be taken as settled for this case, in this court, if for no other case nor any other court; and for further authority see Amora v. West, 6 Wall., 139.

Since the decision on the demurrers, and the motion for preliminary injunction, the complainant has, by leave obtained of the court, filed an amended bill. Said amended bill, in addition to the matters previously alleged in the original bill, and in other bills of revivor and supplement, charges:

That the contract between the Republic and Mercer created an express trust as to all the lands embraced in the limits assigned to the Mercer colony, which trust has never been satisfied, reversed, abandoned nor forfeited.

That by the stipulation attending upon the annexation of Texas to the Union, an express trust was created upon all the vacant and unappropriated lands retained by Texas, to secure the payment of all the debts and liabilities of the Republic.

That the rights acquired by Mercer and his associates constituted one of the liabilities covered by this express trust, resulting from annexation, and that the said liability has never been satisfied, extinguished nor forfeited.

That there was never any intention of the deputies of the people in convention assembled to declare any forfeiture of colony contracts, or to establish by any constitutional enactment how and why any forfeiture should be declared; and that no method has ever been declared by law for the forfeiture of such grants and the disposition of the lands.

That, notwithstanding the grant to Mercer and his associates, the defendant and his predecessors in office, without warrant of law, have assumed and pretended to make and issue and deliver certificates and patents for lands within the limits of the Mercer grant to numerous

persons not claiming through or under privity of Mercer or the Texas Association, which persons have paid money and made improvements in ignorance of their infringement on the rights of the Texas Association, and that this has been done to such an extent that the remaining land within the limits of the Mercer grant are inadequate to satisfy the just demands and rights of the complainant.

That complainant is unwilling to interfere with the persons so acquiring rights, as they have expended money and labor in apparent good faith, and an interference would result in great hardship.

That the defendant is violating the preliminary injunction issued in this case, and confederating with O. M. Roberts, Governor of Texas, is issuing certificates and patents for lands in contempt of this court, and to the great injury of complainant.

That defendant, confederating with said Roberts, has procured the passage of an obstruction act by the Legislature of the State, which act makes it the duty of the Governor to countersign all certificates and patents of public lands.

That the lands within the limits of the Mercer colony, by reason of their location and fertility, are more valuable than the other vacant lands in the State, and that if orator is driven to the other lands to satisfy his claim, quantity should compensate for quality.

That under the Constitution and laws of Texas, as they existed when Mercer's rights attached, and when this suit was instituted, the records and surveys and plats and maps relating to the public lands were to be kept in a general office to be under the charge of a general land commissioner, who, upon proper showing, should issue patents for lands under the seal of the State. And that defendant is such commissioner in charge of such office, and that he and his predecessors, though duly demanded, have refused to issue to orator and the Texas Association such certificates and patents as the records of the Land Office clearly show orator and the Texas Association are entitled to have and receive, and that until such delivery of certificates and patents there is no duty devolving upon any other officer or department of the government of the State, nor upon orator nor the Texas Association, under the terms of the Mercer contract.

And the bill prays for a discovery for the perpetuation of the preliminary injunction; for a further injunction restraining defendant, as general land commissioner of the State of Texas, from issuing certificates or patents for any of the vacant and unappropriated lands of the State within or without the limits of the Mercer colony grant, until orator's just demands are satisfied; for a mandatory injunction compelling the defendant to issue patents to orator for the use of the Texas Association, covering about two thousand seven hundred and fifty-two sections of land, as grants, premiums and pre-emptions within the limits of the Mercer colony, or if not found therein, then for an equivalent from the other vacant lands of the State, and for general relief, etc.

The defendant filed a plea in bar, and a disclaimer and answer, and a motion to dissolve prior to the filing of the amended bill.

After the amended bill, he filed a general answer, which, of course, waived his pleas, and the original answer was merged in the last general sworn answer.

This answer, containing the whole defense exhibited, sets up:

1. A denial of performance on the part of Mercer and his associates of the various obligations devolving upon them under the contract, specifically, to-wit:

A. That Mercer never introduced settlers, as bound by his contract.

B. That he never made the surveys, and furnished the plats, maps, field notes, etc.

C. That he never built the cabins or small houses.

D. That he never furnished and kept on hand the ammunition supplies.

E. That his settlers were not armed with rifle, yager or musket.

F. That he did not make the reports required by the contract.

G. That he and his associates did not obtain the act of incorporation required.

2. That Mercer and his assistants were required, by a joint resolution of the Republic, approved February 3, 1845, to have the lines of their colony land actually surveyed and marked by April 1, 1845, under pain of forfeiture; and that therein Mercer and his associates failed.

3. That the map bearing date May 1, 1845, filed with bill marked exhibit "E," appeared to be of recent date, and had been surreptitiously deposited in the office of the Secretary of State without the knowledge or consent of the officer, and that said map was not made in accordance with the contract, did not give the correct boundaries or limits, and took in about 3000 square miles more than the contract covered.

4. That the contract was made against the will and in contempt of the people of Texas, having been made after both houses of the Legislature had passed a bill repealing the authority theretofore given the President to make such contracts, and only the day before such bill became a law by passing over the veto of the President, and that Mercer was well aware of the opposition of the people, as he was present attending on the session, attempting to procure from the Congress an extension of the Peters' contract, in which he was interested.

5. That the opposition of the people continued, and that the Convention of 1845 adopted an ordinance denouncing colony contracts as unconstitutional and void, and as operating a monopoly, to the exclusion of citizens, soldiers and creditors of the Republic, and providing that it should be the duty of the Attorney-General of the State, or the district attorney of the district in which any portion of the colonies might be situated, as soon as the organization of the State should be complete, to institute legal proceedings against all colony contractors, and providing that if any contracts should be found, upon such investigation, unconstitutional, illegal or fradulent, or that the conditions had not been complied with according to its terms, such

contract should be adjudged null and void, but without prejudice to actual settlers.

That said ordinance was adopted by a vote of the people, and thereby became a part of the fundamental law of the land, and that the State organization was completed February 16, 1846.

That in obedience to said ordinance, J. W. Harris, Attorney-General of the State of Texas, on the eleventh day of October, 1846, filed a suit in the District Court of Navarro county, in which county part of the Mercer grant was situated—a suit in the name of A. C. Horton, Governor of the State, for and on behalf of said State, as plaintiff, against Charles Fenton Mercer and his associates, as defendants, alleging non-performance on the part of said Mercer and his associates, and illegality and unconstitutionality from the beginning, and praying that the contract be declared null and void from the beginning. That said Mercer and his associates were duly and legally cited to appear and answer; and that thereafter, at the September term, 1848, the said suit was fully heard and determined; and it was fully and finally adjudged and decreed, upon the verdict of the jury, that the said contract of January 29, 1844, was null and void.

That such judgment is still in full force, unreversed and unavoided.

6. That the parties in that suit are identical in interest and privity with the parties to this suit, and that the subject matter is the same of which the District Court of Navarro county had jurisdiction, that Mercer and his associates were represented and had a fair trial, and that the said judgment has the force of an estoppel, and the same is a full and complete bar to this action.

7. That the State has never, by the act of February 3, 1850, nor by the act of August 12, 1870, nor by any other act, recognized the validity of the Mercer contract. On the contrary it has always acted on the theory of its invalidity, and all legislation in relation to its public lands, or in relation to relief to actual settlers in the Mercer colony limits, has stipulated against the contractors taking any benefit from the legislation.

8. That no trust has ever been created in favor of Mercer and his associates, no title has ever vested, no possession has been had, and that the complainant nor the Texas Association are entitled to any of the public lands by reason of said contract, either for settlers or for premiums.

9. That defendant is a sworn and bonded officer, governed by the laws of the State, and that by law, approved April 19, 1877, when questions may arise he is obliged to consult the Governor and follow his advice. That in this matter he has advised with Hon. O. M. Roberts, Governor, and has been instructed by the Governor not to issue any certificates for land to said Mercer and associates, and to those claiming by or through or under them, and that he is advised and believes that it would be a breach of his official bond and a violation of his official oath to issue any such certificates to complainant or the Texas Association.

10. That William Preston, complainant, has no authority to stand

in judgment in this suit; that the members of the Texas Association are the proper parties to this suit, and that this suit is defective for want of such parties.

11. That the settlers in the limits of Mercer colony are interested in the lands claimed, and that the bill is defective for the want of such parties.

12. Pleading the statutes of limitations and staleness of demand, denying secrecy and fraud, but claiming open and notorious repudiation by the State of complainant's demand.

And the defendant denies conspiracy with the Governor, denies having infringed the injunction in this case, and makes all the discovery that defendant finds possible in the premises.

To this answer a general replication is filed by the complainant.

This statement of the pleadings, taken in connection with the full statement of the pleadings and facts as reported in the case of Hancock v. Walsh, to which reference is made, shows the issues presented to this court.

The evidence offered and admitted on this hearing is bulky and voluminous, and cannot be recapitulated here, even if necessary.

The following may be taken as the substance, and it will be found sufficient to understand and support the decree allowed in the case:

The complainant has established the contract between the Republic, through Sam Houston, President, and Charles Fenton Mercer and his associates, as alleged in the bills; the entrance of Mercer upon the duties devolving on him under the contract; the organization of the Texas Association; the appointment of surveyors and colonization agents; the running of lines and surveys; the introduction of 119 families within the first year of the grant; the making of the survey of the boundary limits of the colony grant by April 1, 1845; the settlement of 1256 families within the limits of the colony prior to October 25, 1848; the appointment of Mercer as chief agent and trustee of the Association; the subsequent appointment of Hancock as chief agent; Hancock's death and the appointment of Preston, ratified by the Association, as chief agent; the entrance of the gentlemen upon the performance of their duties as agents of the Association, and the activity displayed by them respectively in furthering the objects and interests of the colony and the Association. The employment of counsel, the expenditure of money, and the persistent applications made to the political department of the State of Texas for relief. Further, the complainant has shown that Mercer, as agent, made reports, as required by contract, up to and for the year 1847, to the government of Texas; that Mercer is dead long since, and that all his papers and documents, among which were copies of his correspondence and reports in relation to the Mercer colony, have been lost and destroyed.

In short, the substance of the original bill is established. There are only two points questioned seriously as not yet proved:

1. Preston's right to act as chief agent and represent the association.

2. The proof of the settlement of 1256 families prior to the expiration of the grant.

As to the first point, it is shown that Hancock was chief agent in accordance with the articles of association, with power to substitute; that he died, and in his last will and testament transferred his shares to Preston and appointed Preston chief agent. It is shown that Preston assumed the duties of chief agent, and that his assumption has been approved and ratified by the other shareholders.

Any defect of Preston's authority to represent the association has been cured by ratification. It is elementary in the law of agency that ratification of the acts of an agent amounts to as much and has the same effect as an original appointment.

The proof of the introduction and settlement of 1256 families is made by Crockett's report.

Under the act of February 2, 1850, Crockett was the sworn and bonded officer, but agent of the State to issue patents to such of the settlers of Mercer's colony as were intended to be relieved by the act.

Under the law, he could only issue certificates to such colonists as proved by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas, but became citizens of the Mercer colony prior to October 25, 1848.

Crockett's own sworn report shows that 1256 families made such proof to his satisfaction, and that he issued certificates as required by the law.

Now, it was covenanted in the contract between the Republic and Mercer that all the unlocated lands lying in the limits of this colony grant at the date of the grant should be exclusively set apart and reserved for five years for the use of Mercer and his associates, to be colonized by them under the contract.

The depositions of Pillons and others show that at the date of the contract there were very few, if any, locations within the Mercer colony limits.

There is no direct evidence to show whether the 1256 families, proved by Crockett to have settled prior to October 25, 1848, were all or any of them introduced by Mercer or the Texas Association. Nor is there any proof to show the negative.

The families were there and settlers. They could only be there lawfully under Mercer and the Texas Association.

In the absence of proof, it is a strong presumption that they were settlers there lawfully—that is, under Mercer and the Texas Association —not as trespassers and squatters.

Besides this presumption, I do not regard it as absolutely necessary that every settler who located in the Mercer colony should have been previously personally solicited and induced thereto by Mercer or his agents. The contractors could not have so contemplated.

One settler would naturally induce others, and the advertisements and maps and advantages and improvements would certainly aid in the scheme of colonization and settlement.

The depositions offered by the defendant upon this subject (which

are amenable to the charge of incompetency, as hearsay evidence, but), though given full force as evidence, are not strong enough to rebut this presumption in favor of law and order.

The witness knew, had heard, of no one who claimed to have been induced to settle by Mercer or his agents, or under the Mercer colony grant.

And it might be noticed, under the law of 1850, it was not necessary, in order to receive the donation offered by the State, that they should claim under Mercer.

And it is plausible to say that, under the hostile attitude evinced by the people of the State at that time towards the colonization contracts, many settlers might have been deterred from claiming under obnoxious titles, particularly when such claim was wholly unnecessary.

The allegations in the amended bill of complainant are also, in the main, established, except in relation to the conspiracy alleged between the defendant and Governor Roberts, and in relation to the charge of contempt for violation of the injunction heretofore issued in the case.

Upon this last mentioned matter, the proof fully exonerates the defendant.

The defendant shows by the expositions of various witnesses, mostly old settlers, that Mercer and his associates had not complied with the various stipulations and details of the contract in many small matters, so far as the knowledge of the witnesses extended, but this evidence is negative, and at this late date it can hardly raise a presumption even of non-compliance.

In relation to this, it may be well to notice that by the terms of the contract a forfeiture or determination of the contract was only to result from non-performance, on the part of Mercer and his associates, in relation to the introduction of a certain number of families within certain fixed periods; for instance, one hundred families by May 1, 1845, two hundred and fifty families within two years, and one hundred and fifty families within each of the remaining three years the contract was to run.

And further, that no default or determination was to operate otherwise than prospectively.

The defendant fails to show the truth of his charge in regard to the survey of 1845 and the manufacture of the map of that date.

The remaining allegations of defendant's answer—leaving out arguments and conclusions of law therein contained—may be considered as substantiated. The proceedings in the Navarro county court are proved, with the variance that the suit was brought in the name of A. C. Horton, acting Governor, for the benefit of the people of Texas, instead of, as alleged, in the name of A. C. Horton, Governor, for and on behalf of the State of Texas, and that there is no proof of service by publication or otherwise of the defendants. It is true that the record produced shows that service by publication was ordered by the court and by the sheriff, but it does not show how, where or when publication was made, or that it was made at all. The recital in the

alleged judment of the words, "and it appearing to the court that service had been perfected," cannot cure the defect.

As I understand the law, the record must show affirmatively that the forms of service provided by law have been complied with, before the judgment of a court, otherwise having jurisdiction, can have the force of the thing adjudged.

Certainly the insertion in the judgment of a few words cannot have the talismanic effect of supplying the want of service.

I am not at all certain but that the many other glaring defects on the face of the record, so far as proved, or so ably argued by counsel, strike the entire proceedings in Navarro county with absolute nullity. The defects are most certainly very serious relative nullities.

Now, taking the facts as I have found them to be disclosed by the evidence, I am satisfied that the following propositions of law, as applicable in this case, are clearly maintainable:

1. The contract made by the Republic of Texas, acting by Samuel Houston, President, on the eighth day of January, 1844, with Charles Fenton Mercer, was valid and binding on the Republic.

2. That contract created an express trust in favor of Mercer and his associates of all the unlocated lands then lying within the limits fixed by the contract to secure the performance of the contract.

3. That by the compact of annexation the State of Texas assumed all the obligations, liabilities and duties, including those resulting from the express trust, theretofore bearing on the Republic of Texas in relation to said contract with Mercer.

4. That under the Constitution of the United States, and the resolutions and compact of annexation, the State of Texas has been, and is, without power by any law to impair the obligation of said contract or the trust resulting therefrom.

5. Neither lapse of time nor any defense analogous to the statute of limitations can be set up by the trustee of an express trust or a defense to his ability to execute the trust.

6. That while the ordinance adopted by the Convention in 1845 (Hartley's Digest, p. 84), after ratified by a vote of the people, may have conferred power upon the law officers of the State to sue for, and jurisdiction on the courts to force forfeitures on the colonization contracts, yet that the proceedings had and the judgment rendered in the District Court of Navarro county, in the years 1847 and 1848, wherein A. C. Horton, acting Governor, for the benefit of the people of Texas, was plaintiff, and Charles Fenton Mercer and associates unknown, were defendants, were absolutely null and void for want of legal notice to the defendants.

7. That the State of Texas by law has never repudiated the contract with Mercer or the trust resulting therefrom.

8. That the court of equity has jurisdiction to prevent, by injunction, the waste, alienation or destruction of a trust estate.

9. That while the circuit courts of the United States have no jurisdiction to entertain a suit against a State of the Union, they have jurisdiction of and will entertain a suit brought by a proper party

against an officer of the State, who, under color of his office, but without lawful authority, is wasting, alienating or destroying a trust estate, although the State may be the trustee and remain silent.

10. That in such a suit, where the State is no party, and yet is declared to be the trustee of an express trust, the defendant is without right or interest to plead in defense a repudiation by the trustee, to shield himself from unlawful conduct.

The first five of these propositions of law are laid down by Judge Woods, well supported by authority, and, as I have shown *supra*, are the law of this case.

The sixth proposition is undisputed law. (Hollingsworth v. Barbour, 6 Peters, 476; Harris v. Hardeman, 14 Howard, 343; see 7 Texas, 483; 9 Texas, 353; 17 Texas, 647; 27 Texas, 441; 45 Texas, 507; and the case of Treadway v. Eastburn, lately decided—N. R.)

The seventh proposition is shown, by an examination of the various laws of Texas, cited on both sides in this case, and I might, with safety, go further than I have, and say that, under 1, section 10, article 1 of the Constitution of the United States, the State could pass no valid law impairing the obligation of Mercer's contract.

The eighth and ninth propositions are fully sustained by the decision of the Supreme Court in the case of Davis v. Gray, 16 Wallace, 203.

The tenth proposition is a corollary legitimately following the decisions in Davis v. Gray and Hancock v. Walsh.

The fact is, that these two last mentioned cases furnish nearly the entire law of this case.

At the same time I deem it proper to say that nearly every proposition involved herein, I believe, from the examination I have been able to make, and from the authorities cited in argument by the distinguished counsel on both sides who have aided in this case, can be, and is, fully sustained by Texas authority as declared by the Supreme Court of the State.

Now, applying the law as I understand it, to the facts of this case, I think it clearly follows that complainant is entitled to a decree in his favor, embodying such relief as he has asked and the court has jurisdiction to give.

He asks for an injunction restraining the defendant, as Commissioner of the General Land Office of the State, his servants, agents, employees, etc., from issuing, passing or granting any certificates or patents for lands lying within the limits of Mercer colony, to any person or persons other than the complainant or the Texas Association, and persons holding and claiming under or in privity with the said Association; and restraining the defendant, etc., from hindering and obstructing complainant in the execution and performance of the Mercer contract, and in obtaining the certificates and patents of lands to which the complainant and the said association are entitled under the terms and conditions of said contract.

The relief is within the jurisdiction of the court, and is after the manner of the proceedings in equity.

The complainant asks further for mandatory injunction to restrain the defendant from refusing to issue to complainant patents and certificates for thirteen hundred and seventy-six sections of land to which complainant is entitled under the contract, by reason of settlers introduced thereunder, and to thirteen hundred and seventy-six sections of land, to which he is also entitled, under said contract, by tendering in payment thereof twelve dollars in coin and script to the amount of $540, or its equivalent in money, for each section, and restraining said defendant from hindering him from locating the said certificates and patents upon any of the vacant and unoccupied lands of Texas within or without the limits of the Mercer colony, etc.

This relief, no matter how just, I conceive to be beyond the jurisdiction of the court in this case for want of proper parties.

The whole theory of this case is, that the contract with Mercer created an express trust, which by operation of law and compact devolved upon the State of Texas; that the State of Texas is now the trustee, the Texas Association the *cestui qui* trust; that the legal title is in the State, the equitable title in the association. It has been vehemently alleged by complainant and adjudged by this court that the State is not a party to this suit.

The relief asked is in the nature of specific performance of the contract, or at least amounts to a decree for title.

For the court to grant such relief, it is imperative that the party required to perform, or who holds the legal title, should be before the court. (Pomroy on Specific Performance, Sec. 483, *et seq.;* Daniell's Ch., 194–196; Perry on Trust, Sec. 873–874; see Justice Field in Saw., 685; and authorities can be multiplied to any extent.)

It will be noticed, too, that under the contract, after the performance of certain conditions precedent (with regard to survey and selection of sections), it is the government of Texas that is to convey, or cause to be conveyed, the title to the lands surveyed and selected.

To grant the relief asked would be to compel the conveyance of title from the State to complainant of unlocated and unsurveyed lands, and allow the location and survey of any of the vacant lands of the State, which I conceive to be wholly outside of the contract, and, besides, would be taking practical possession, under this and other injunctions asked, of the Land Office of the State.

In Hancock v. Walsh, Judge Woods says: "This is not a suit against the State, and does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which it seeks to appropriate are not the property of the State." (3 Woods, 366.)

Under the act of May 12, 1846, section 3952 of the code of 1879, which was in force at the institution of this suit, it was required that "every patent for land emanating from the State should be issued in the name and by the authority of the State, under the seal of the General Land Office, and shall be signed by the Governor and countersigned by the Commissioner of the General Land Office."

In the act of 1879, denominated by counsel as the "obstruction

act," it is provided that before any certificate for land reserved by the Commissioner of the Land Office, in cases where the commissioner has doubts or where there is a suit to compel or restrain the commissioner in the issuance of certificates. shall have any force or effect, the same shall be submitted to and be countersigned by the Governor of the State.

It is urged that this obstruction law must be disregarded, because passed since the institution of this suit, with a view to affect the remedies to be granted by the court, and that it impairs the vested rights of complainant under his contract.

I am not prepared to say that complainant, under the Mercer contract, acquired any vested right as to the forms and manner in which the title of the Republic was to pass or be conveyed. If he did, he is remitted to the laws in force at the time of the making of the contract.

An examination of the laws of the Republic in force at the making of the contract fails to show any authority for the Commissioner to issue land certificates. Many other officers and boards could issue them, but not the Commissioner.

The contract itself provides for no certificates to be issued by the Commissioner.

As I view the matter, therefore, under the laws of Texas, to operate the conveyance of title emanating from the State to public lands, either by patent or certificates, the act of the Governor of the State is necessary, and the Governor is no party to this suit.

The case of Davis v. Gray, affirming Osborne v. United States Bank on the subject of making, and requiring the State to be made, a party where the State is concerned, is very strong, and I feel bound to go as far as that case, but I must leave to the Supreme Court to go further, or declare the law that the courts of the United States can go further.

Article 11 of the amendments to the Constitution of the United States inhibits suits against the States; to construe it so as to allow the property of a State to be alienated or conveyed in a suit against a subordinate official of the State, is not only to nullify the amendment, but to put the State in a worse plight than if the amendment had not been adopted, for without the amendment the State would always have her day in court.

The complainant also asks an injunction to restrain the defendant, as Land Commissioner of the State, from issuing any further patents and certificates for any of the vacant and unlocated lands of the State beyond and outside of the Mercer colony limits to any person whatsoever, until the just demands of the complainant, arising under the Mercer contract and the public trust created by the compact of annexation to hold the public lands for the payment of the debts and liabilities of the Republic, are fully compensated and satisfied.

This demand involves the propositions:

That the treaty or compact of annexation created such a trust in favor of the creditors of the Republic as could be enforced in the

courts of equity. In other words, that it contemplated that any creditor might sue the State and obtain a decree for the sale of sufficient of the public lands to satisfy his demand. I doubt if any such trust was contemplated or created, particularly in the face of the inhibition of the Constitution of the United States as to the right to sue a State in the courts.

That a great public trust was created, that the public faith was pledged, that the State of Texas may be bound in morals and good faith to apply the public lands as stipulated in the treaty, I agree, but I doubt the power and authority of the Circuit Court of the United States, sitting as a court of chancery, to enforce these obligations.

The learned solicitors for the defendant have, with great ingenuity and force, argued to the court several propositions that I will merely advert to.

They claim that no injunction should issue in this case, as it would be a vain and useless order, so far as giving any relief to complainant is concerned. It does not seem so to me. Preventing the further waste of the trust estate, preventing further clouds from being thrown on complainant's equitable title, and preventing defendant from further obstructing complainant in the assertion of his rights, would seem considerable, valuable and effective relief.

It is further said by solicitors that complainant should be remitted to the political department of the State government for the relief his case demands. I do so remit him, but at the same time I grant the relief—as I am bound to do—that I find he is entitled to from the court, and the court aids him to protect his property until the conscience of the political department is moved, and the said department can see its way clear in the premises.

It has been urged, and in fact charged, in the answer, that many innocent persons have acquired equitable titles to lands in the limits of the Mercer colony, and that to continue the injunction will operate a loss and hardship.

No proof is made, but taking it to be true, there is no suggestion that any of these equitable titles are of a higher nature or of earlier date than complainant's titles. It shows the more forcibly the necessity for the action of the political department of the State, but shows no sufficient reason for this court to deny complainant the relief that equity and good conscience require.

For these reasons, and many other that might be given, and well knowing that any errors that I may make, either in granting or in denying the full measure of relief, can and will be revised and corrected by the honorable the Supreme Court of the United States, I consider it my duty to pass the accompanying decree. And it is so ordered.

(Signed) DON A. PARDEE, *Judge.*

No. 25.

FINAL DECREE.

In Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.—No. 98. William Preston, complainant, v. W. C. Walsh, Commissioner of the General Land Office, etc., defendant.—In Equity.

This cause came on to be heard at this term on the twenty-sixth day of January, 1882, and was argued by counsel, and thereupon, upon consideration thereof, it was and now is ordered, adjudged and decreed as follows, namely:

First, That the complainant's allegations are found to be true and supported by the proof; and that the order and writs of injunction heretofore granted and issued in this cause is hereby made perpetual; and the defendant, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, and all and every his successors in office, and all his clerks, draftsmen, subordinates, agents, servants and employees, and all officers or agents subordinates to him, the said defendant, or to any of his successors in office, or in any manner under the directions, supervisions, or control of him, or of any of his successors in office, be and hereby is and are restrained, prohibited and forever enjoined from issuing or delivering, or permitting to be issued or delivered, to any person or persons, or to any corporation, any certificate or certificates, patent or patents, plat or plats, for any land or lands within the boundaries of Mercer's colony, as set forth in the bill of complaint and the exhibits therewith filed; and from any and all interference with, or infringement of, or upon, the land grant or land reservation known as Mercer's colony; and from doing, or causing to be done, any act or thing whereby there may issue any patent, certificate, plat or grant of any land within the boundaries of said Mercer's colony, as defined and set forth in the bill of complaint and the exhibits filed, and as set forth in the contract made on the twenty-ninth of January, 1844, by and between the Republic of Texas, by Sam Houston, President thereof, and Charles Fenton Mercer, filed herein, whereof the original is on file in the office of the Secretary of the State of Texas, and a copy is on file in the office of the Commissioner of the General Land Office of the State of Texas; except to the complainant, William Preston, as chief agent of the Texas Association, or his successors or assigns, or to such person or persons as he or his successors may in writing direct.

And it is further ordered, adjudged and decreed, that the defendant, William C. Walsh, Commissioner of the General Land Office of the State of Texas, and each and every his successors in office, and all his or their servants, employees, agents, clerks, draftsmen, surveyors, deputies and subordinates, each and every one be and the same are enjoined, restrained and prohibited from hindering, obstructing, preventing or delaying the said William Preston, his agents, attorneys, employees, or the successors or assigns of said Preston and their agents, attorneys or employees, in the surveying, selecting, platting, recording,

entering or claiming any and all lands lying within the limits and boundaries of the so-called Mercer colony, as set forth in the bill of complaint and the exhibits therewith filed; and the said defendant and his successors in office, and his and their agents and subordinates, are enjoined from hindering, obstructing, preventing or delaying the said Preston, or his successors or assigns, or the Texas Land Association, from performing and completing and perfecting all and singular the several conditions, duties, obligations and acts devolving upon the said Preston or said association, under the terms and stipulations of the colonization contract set forth in the bill of complaint in this cause, and in the exhibits filed with the said bill of complaint: *Provided*, That this decree and the injunction herein shall not be held, nor intended, to affect any lands appropriated or set apart by the act of Congress of the Republic, entitled, "An act appropriating certain lands for the establishment of a general system of education," approved January 26, 1839, and which lands were legally located, surveyed and appropriated for a State university, prior to January 29, 1844, the date of the Mercer colonization contract.

And it is further ordered and adjudged, that the defendant do pay all the costs herein incurred, the clerk to tax the same, and that proper process issue therefor.

Decree rendered January 25, 1882, and signed January 26, 1882.

(Signed) DON A. PARDEE, *Judge.*

True copy from the minutes of the court.

Test with seal, this twenty-seventh January, 1882.

[SEAL.] M. HOPKINS,

Clerk U. S. Circuit Court, Austin, Texas.

OFFICE SUPREME COURT U. S.
FILED
MAR 2 1883
JAMES H. MCKENNEY, CLERK

109-297

Supreme Court of the United States.

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, - - - - - Appellant,

VERSUS

WILLIAM PRESTON, - - - - Appellee.

No. 863.

BRIEF AND ARGUMENT OF WILLIAM PRESTON.

COURIER-JOURNAL JOB-ROOMS PRINT.

Supreme Court of the United States.

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellant,

VERSUS

WILLIAM PRESTON, ... Appellee.

No. 863.

BRIEF AND ARGUMENT OF WILLIAM PRESTON.

This is an appeal prayed by the Land Commissioner of the State of Texas, against a decree rendered in the Circuit Court of the United States for the Fifth Circuit and Western District of the State of Texas. The application for the appeal is in due form, and bond was given February 3, 1882. (See Record, pages 337–8.)

The controversy is between William Preston, the appellee, as chief agent and trustee of a joint stock company known as the Texas Association, and the appellant, who was the defendant in the circuit court. The subject-matter of the suit relates to a grant of land in northeastern Texas, lying between the present city of Dallas and the Indian Territory, on the headwaters of Red River and the Trinity River. The original bill was filed on the 6th day of March, 1875, and the suit was instituted in the name of George Hancock, a citizen of the State of Kentucky, complainant, against John J. Groos, at that time Commissioner of the General Land Office of the State of Texas.

The appellees set forth the public policy that led to a certain grant of the 29th of January, 1844, and contract by and between the Republic of Texas, and Charles Fenton Mercer, a copy of which from the original in the Department of State, is made an exhibit marked "A" with the original bill. This contract for colonization

will be found in the printed record at page 91, and is the foundation of the title of the Texas Association.

The bill further sets out a certain form of agreement between Mercer and the settlers or colonists, which he agreed to introduce within the boundaries described in the grant, a copy of which will be found at page 101 of the record.

The substance of the bill shows that the Republic of Texas was very anxious to establish two colonies, one known as the Peters' Colony, and another colony under the authority of the same statutes known as Mercer's Colony, lying immediately east of the Peters' colony, and described in the contract by certain notorious and natural landmarks known at the time to the whole country, and designating clearly the location of the grant. The Digest of Hartley, page 556, and Paschal, articles 886, 887, 888; and note 413, page 245, state and refer to the acts of the Republic of Texas under which these twin colonies were established for the settlement and defense of its then remote northeastern frontier. The grant to Mercer has been recognized as valid and binding on the Republic by the decision in Melton vs. Cobb, 21 Texas, 539, and by the legislative and executive departments of the government of that State. The prayer of the bill was to restrain the Land Commissioner from issuing certificates to parties for these lands without authority of law, and thereby invading the possession and clouding the title of the Texas Association to the lands thus reserved as stipulated in the grant.

The answer of the defendant on the merits maintained that he was in the line of his rightful official powers because the land had been re-annexed by competent authority to the public domain, and was then under his exclusive jurisdiction and control. The examination of this cardinal question of fact, will be pretermitted for a while.

George Hancock having died on the 27th of August, 1875, William Preston became his successor as chief agent and trustee of the Texas Association, and by proper bills the cause was revived against William C. Walsh, the successor of John J. Groos, the original defendant, who had died likewise in the interval. Before his death the defendant Groos appeared by George Clarke, attorney general, and A. J. Peeler, assistant attorney general, on the 30th of April, 1875, and filed his demurrer, assigning four grounds of exception to the bill. The grounds were that the complainant's suit was in effect against the State of Texas, and sought to interfere with and deprive the State of

the right and power of disposing in its own way of its public land. This portion of the demurrer is technically what is called a "speaking demurrer," as it assumes the fact which is in reality the chief subject of contention.

The second ground of demurrer was that the complainant, if entitled to relief, could only obtain it through the political department of the State of Texas, and that the case made was not cognizable by the court.

The third ground was that the complainant was not entitled to discovery.

The fourth ground was that the demand was stale, and barred by lapse of time and *laches*.

The deaths of the parties delayed the case until it was revived, as already stated, in the name of William Preston vs. William C. Walsh, the present appellant and appellee, the 15th day of April, 1879, when it came on for hearing on the demurrers.

All the questions of law raised by the demurrers were very fully argued by counsel before the Hon. William B. Woods, circuit judge at that time of the fifth circuit, who delivered a written opinion which was afterward published in 3 Woods, Circuit Court Reports 351. This opinion states very lucidly and compactly the allegations and statements of the pleadings, and the issues raised by the demurrers, which the court classified in ten propositions. A copy is contained in the record at pages 338 to 349 inclusive. It is also published in a separate pamphlet for the greater convenience of the members of this court, together with a subsequent opinion on the merits by Judge Pardee, which pamphlet is filed herewith. The propositions are stated at pages 6 and 7 of the pamphlet containing the opinion.

The motion for the temporary injunction was granted against the commissioner as prayed by complainant, and all the grounds of the demurrer were severally considered and each overruled. The preliminary injunction was granted on the 19th of April, 1879, and will be found at page 24 of the printed record.

Afterward, on the 31st of May, 1881, the defendant Walsh filed a disclaimer (see record, page 25), and on the same day a special plea, setting up new matter of an alleged forfeiture of the grant by way of estoppel and *res adjudicata*, and on the same day an answer containing twenty-four paragraphs, reiterating all the questions made by the demurrer which were all overruled, objecting to the jurisdiction of the

court; maintaining that the lands in controversy were part of the public domain; alleging that Mercer had never performed his contract and the numerous conditions annexed to his grant for introducing and settling colonists, cultivating lands, and many other conditions subsequent. The answer also claimed a mistake and error in the grant, for excess of land, as shown in the thirteenth paragraph (record, page 35), and likewise a forfeiture in the Navarro District Court, and relied upon the statute of limitations which had been passed upon by Judge Woods in the demurrer; and averred adverse possession by other occupants, and by the State, and set up many other defenses, all of which may be condensed into two propositions: First, That the court had no jurisdiction; and second, that the property was part of the public domain of Texas. This voluminous answer contained nothing that had not already been determined by the opinion and decision of Judge Woods, save the plea of *res adjudicata* and estoppel of record.

Afterward an amended bill was filed by the complainant on the 24th December, 1879, reaffirming all the charges and allegations of the original bill, and bills of revivor and supplement; with some additional statements and allegations. The amended bill contained a prayer that the defendant, Walsh, should be perpetually enjoined from issuing certificates of location, warrants of survey, patents, plats, or evidences of title to any person other than complainant, "of *any lands* within and of the *public domain* of the State of Texas *beyond and outside* of the limits of the colonial grant to Mercer."

It further prayed that on final decree a mandatory injunction issue enjoining defendant from further withholding from complainant certificates and patents for the lands to which he was entitled. And it further prayed that if the vacant lands in Mercer's Colony were insufficient, there should be issued to him certificates for lands equal in value elsewhere, or for a larger amount of less valuable lands elsewhere.

Afterward the defendant, Walsh, on the 2d February, 1880, filed an answer to the amended bill. This pleading is very long. It repeats all of the various defenses of law, by way of exception to the jurisdiction, found in the answer to the original bill; and all the allegations of fraud, with averments collaterally impeaching the contract with Mercer, saying that the grant had been forfeited by certain judicial proceedings in the Navarro District Court, because it was

unconstitutional and void from the beginning; that the Mercer grant had been revoked; that the reservation had been annulled; and that the colony had been abolished and its lands reannexed to the public domain. (Record, pages 59 to 78.)

The amended bill and this answer state, indeed, the whole case of the complainants and all the defenses of the Land Commissioner. On the 23d February, 1880, the complainant filed a formal replication putting the cause at issue.

The testimony of numerous witnesses was taken to establish the case of the complainant; and many copies from the records and archives of the Republic and State of Texas, duly certified and authenticated, were filed with the bills, or produced in evidence, to show title of record, possession within the colony limits, and due performance of the conditions annexed to the grant; and some hearsay testimony was taken by the defendant to help the pretended record in the case of the Governor vs. Charles Fenton Mercer, and to prove a forfeiture of the Mercer Colony grant.

Case made by Complainant.

In the case made by the original bill it is alleged that the Republic of Texas induced Charles Fenton Mercer to enter into a colony contract to colonize the defenseless frontier on the waters of the Red River and Trinity River, under a grant dated 29th January, 1844, a copy of which, from the original on file in the Department of State of the State of Texas, was filed with the original bill as exhibit A, and appears record p. 91 to 100 inclusive.

This contract is the foundation of Mercer's title and the rights of the appellee depend upon its original validity and its present existence.

By its preamble it will be found that President Houston acted under the authority of a law passed by the Congress of the Republic of Texas, entitled an "Act granting land to emigrants, approved February 4, 1841," which was extended and made perpetual by an amendatory act approved February 5, 1842, and by a joint resolution the 16th of January, 1843. These acts are contained and arranged in Hartley's Digest of 1850, page 555; Title, Lands XIII Colonies, referring to Peter's Colony, Mercer's Colony, and other colonies, and in Paschal's Digest, art. 810, page 234, as to Peter's Colony, and art. 846 to 847, as to Mercer's Colony, pages 245, 247.

By the recitals of the preamble to the contract of 1844 it appears that Charles Fenton Mercer became the legal representative of the interests of a part of the original grantees of the Peters' Colony contract under an assignment and transfer dated 22d September, 1841, and that he was desirous to make a contract in 1844 to colonize a *new colony*, afterward known as Mercer's Colony.

The history of the times and of the Peters' Colony, in connection with the statutes referred to, show that President Lamar, on the 4th of January, 1841, entered into a colony contract with W. S. Peters, Daniel S. Carroll, and a number of other persons, chiefly Englishmen, to introduce six hundred families on the headwaters of the Trinity River in certain described boundaries as shown on the map of the Mercer Colony of May 1, 1845, a lithograph copy of which appears at page 112 of the printed record. The colony of Peters was near the then line of Fannin County. The first grant to Peters was for thirteen hundred and twenty square miles, as shown on said map; the second grant adjoined it; the third grant was for twelve hundred square miles, made in 1842, lying east of the first grant, and by a subsequent grant of 1843, another large grant of sixteen thousand four hundred square miles was made to the London Company or the Peters' Colony Company, but this fourth or last grant included the three other grants as shown on the map. Mercer, as stated, was an owner of a large interest in this Peters' Colony contract under an assignment of September 22, 1841. At that time the Republic of Texas was at its lowest point of depression. The interest excited by the battle of San Jacinto had passed away. The feeble Republic begged in vain for annexation to the United States. President Jackson, though sympathizing with her struggles for independence, feared diplomatic difficulties with England and France, and repelled her petitions. Texas had no revenue, navy, army, commerce, manufactures, nor exports to support the government. Her only resource was land, and land-script was her only export. This was peddled at New Orleans and Louisville to get money to pay the State officers. The line of the Rio Grande was threatened by Mexico, and the reconquest of Texas impended. The insecurity was such that President Jackson did not consider sufficient proof had been given of the power of Texas to warrant annexation. The history of the times and the public documents all establish these facts.

It was at this time that General Houston induced General Mercer,

an old friend, both natives of Virginia and colleagues in Congress, to visit London, so as to promote the colonization and defense of northeastern Texas.

This is the explanation of the recital in the contract of November 29, 1844.

The London Company failed in doing any thing until Mercer joined it.

The joint resolution, approved January 16, 1843, was followed by a contract, being the fourth grant noted in the lithograph map. By this contract, entered into between Samuel Houston, President of the Republic, of the first part, and Daniel Joseph Carroll, of London, Charles F. Mercer, of Florida, Thomas Jones Mawe, and Martin Stukely, of London, and Sherman Converse, of New York, the large grant of sixteen thousand four hundred square miles was made, dated January 20, 1843, which was afterward known as the grant to "The Texas Emigration and Land Company," or as it was commonly called, the Peters' Colony, and which was considered and passed on by the Supreme Court of Texas in the case of Stewart vs. Crosby, 15 Texas Reports, 547, cited by this court in Davis vs. Gray, 16 Wallace, 221.

The Peters' Colony was the western and northern boundary contemplated by the new contract of 29th January, 1844, as shown on page 91 of the record.

After this explanation of the preamble to the contract with Mercer, the parties agree and enter into obligations for its faithful performance.

The grant is from the Republic to Charles Fenton Mercer, and such associates as he might choose. Mercer agreed to introduce and settle within the colony boundaries in accordance with the acts mentioned, and within five years from the date of the contract, at least five hundred families. It was stipulated that the number of families to be settled in each of the five years should not be less than one hundred in every year of the term.

It is to be noticed in this connection that by this part of the contract Mercer, as proprietor, had a right to make sub-contracts for areas of land smaller than 640 acres, with each colonial family and with an express proviso that each section, or two half sections of land, should be made by the government of Texas directly to him and his associates, or their legal representatives. Attention is called to

the fact that by the covenant no colonist could claim title to any of the land except under his sub-contract with Mercer and his associates, nor by force of any settlement without the warrant of Mercer. This very valuable right was afterward invaded and violated by the land commissioners.

In consideration of these obligations entered into by Mercer, the Republic covenanted to give, grant, and convey to him and his associates one section of 640 acres of land for each family, or two half sections of 320 acres for each and every family, which they should introduce upon the lands set apart for colonization, and that Mercer should receive full, absolute, and perfect titles in the usual mode.

There are other covenants in the contract which it is useless to discuss now, relating to pre-emption, premium land, the good moral character of the colonists to be introduced, the rifles and arms with which the colonists were to provide themselves, the supplies of ammunition, the surveys to sectionize the land, the return of plats and maps, the preservation of the evidence of performance, and other conditions subsequent annexed to the grant.

The means contemplated by the Republic to establish the colony was the employment of Mercer and his associates in the nature of the empressario contracts under the Spanish law. By the colonization act of 1825 empressario contracts were authorized. These were grants of very large tracts of land, such as those already mentioned, in which the stipulation of the empressario was to introduce and settle not less than two hundred families in a specified time. Other large grants, known as "eleven league" grants, and "hacienda" grants, were made. The "head rights," or grant for actual settlement to each individual colonist, was a "league and labor," or about four thousand six hundred English acres. The price of each league and labor, when sold, was at the minimum of fifteen dollars for tracts remote from the settlements, and a maximum of two hundred dollars or about four cents per acre for the lands near the settlements, so that the price varied from about four cents per acre, as a maximum, to one third of a cent per acre, as a minimum, according to location, and the peril of the settlers from warlike Indians. When Mercer took his contract in 1844 the lands embraced in the reservation were not worth four cents per acre. This price is higher than the first land grants west of the Alleghenies, made by Virginia and North Carolina within the present boundaries of Kentucky and Tennessee.

It is averred in the original bill, and shown by the copy of the contract filed as exhibit "A," that the grant was duly authenticated, recorded, and delivered. This in itself shows that the land described in the contract was severed from the public domain, and removed beyond the jurisdiction of the Land Commissioner.

The grant describes the boundaries by natural landmarks well known in 1844, when there were not half a dozen families settled on the land. The description is as follows (see Paschal's Digest of Texas Statutes, section 261, page 156):

"Beginning on Red River, to the opposite bank of the east branch thereof, emptying into the same from the United States of America, called the False Washita, and running thence due south fifty miles; thence due east fifty miles; thence due south sixty-five miles; thence by a straight course to a point on the Rio Trinidad, or River Trinity, on the bank opposite the lower or southern bank of Cedar Creek, where the said creek empties into the said river; thence across the River Trinity to said bank of Cedar Creek; thence by a straight line to the lower or southern bank of Aquilla Creek, where the said creek unites with the River Brazos; thence up the said River Brazos, according to the meanders of the same, and binding thereupon, to the intersection of the same by the new Indian boundary described in the act of Congress entitled "An act to provide for the establishment and maintenance of peace, and to regulate friendly intercourse with the Indians," on which was grounded the treaty with the Indians made in September last; thence with said boundary, wherever the same may be run and established under the said act, and the treaty made, or to be made pursuant thereto, to the southern boundary of the tract of land set apart for colonization by a contract bearing date the twenty-sixth of July, 1842, between Isaac Burnham, acting for himself and as agent for and in behalf of W. S. Peters and others, of the first part, and Sam. Houston, President of the Republic of Texas, on behalf of the said Republic, of the second part; and thence with the said Indian boundary, or the southern boundary of said tract of land set apart as aforesaid for colonization by the said contract, to the southeast corner of said tract set apart as aforesaid; thence with the east boundary of said tract due north, or with the Indian boundary, should the same be east of the said eastern boundary aforesaid, to Red River; and thence to and with the meanders of Red River, down the south margin thereof to the northwest corner of the tract of land set apart for colo-

nization, as aforesaid, by a contract made pursuant to the act of Congress of the fourth of February, 1841, between the President of the Republic, of the first part, and W. S. Peters and others of the second part, which contract bears date the twentieth day of August, 1841; thence with the western boundary of said tract, and of another tract set apart as aforesaid, by a contract between the same parties, for the same object, running due south to the southwest corner of said last named tract; and thence with the southern boundary of the same to the southeastern corner thereof; and thence with the eastern boundary of said tracts to the beginning of the first of the two last described tracts, at the mouth of Big Mineral Creek, where the same empties into Red River; and thence with the meanders of said river and binding thereon to the beginning, opposite the lower bank of False Washita, where the same empties into the Red River."

These were the lands on the Trinity and Red Rivers which were expressly set apart from the public domain and reserved for five years from location, to be colonized by Mercer, as will appear by the following covenant which precedes the foregoing description. (See page 98 of Record.)

"And it is further covenanted and agreed by the parties to this contract, that the unlocated lands included in the following boundaries shall remain and be held by the government of this Republic for the purposes herein set forth, until the end of five years from the date hereof, and shall be considered as set apart, exclusively of all future claims, to be colonized in the manner aforesaid, by and for the benefit of the party of the second part aforesaid, and of this Republic."

The Mercer reservation was set apart accordingly.

The appellant, on his motion to advance this cause, states that Mercer's Colony contains within its limits, as claimed, about four million acres of land, and embraces in whole the counties of Navarro, Kauffman, Rockwall, and Hill, and in part the counties of McLennan, Limestone, Freestone, Anderson, Vanzandt, Rains, Hunt, Hopkins, Collin, Dallas, Ellis, Johnson, Hood, and Somerville. The area is in fact larger, but this is sufficient for present purposes, and any discussion may be waived for the present.

The first question that arises is whether Mercer performed in a reasonable time the conditions annexed to his grant.

The proof in the record of actual survey and performance is complete. The deposition of P. J. Pillans is shown in the record at pages

151 to 167. From this it appears that the witness is by profession a civil engineer, now residing at Mobile, Alabama, but in 1844 he resided at Bonham, Texas. He first met Charles Fenton Mercer at Washington, Texas, in 1843 or 1844. Witness was then a young man. He knew all the negotiations between Mercer and Houston, and copied the contract about the time it was drawn. Immediately after the contract was signed he was employed to go to the colony lands and make the necessary arrangements for running and marking the boundary line and to superintend such other surveys and matters in connection with the colony as might become necessary. Funds were given him and he purchased the necessary outfits and made the journey overland from Houston to Bonham. Pillans, as the agent and manager for Mercer, employed in April, 1844, William H. Hunt, a surveyor of Fannin County, to run the Mercer Colony boundary. The line from Red River south fifty miles, as set forth in the description, lay within what was well known as Peters' Colony. As it was deemed necessary to run this part of the boundary, Pillans directed Hunt to commence at the east line of Peters' Colony and run east. This direction Hunt obeyed. Mercer also employed, as Pillans testifies, Claxton Taylor to subdivide the Mercer Colony land into sections, and Thomas C. Bean was engaged for the same purpose. Taylor and Hunt are dead, as the witness believes. Hunt ran the line from the east line of Peters' Colony fifty miles south of Red River, and while so engaged drove or had driven stout stakes to mark the miles. This was done to mark the colony line in the prairie, and also to enable subsequent surveyors to subdivide the land into sections. Pillans went with Hunt's party while engaged on the northern boundary, for many days together, at various times. Pillans cut the mile numbers in the stakes, and they were driven into the ground at every mile, and he received the colonists sent to him by Mercer, or such as applied to be settled under his grant. Mercer caused the lands to be extensively advertised and he sent the advertisements to Pillans. The lands granted to Mercer were for the most part beyond the settlements. When Pillans entered upon the colony lands in April, 1844, to take possession for Mercer, they were without inhabitants or claimants. Pillans deposes that he never met but one family that claimed to have settled before the grant to Mercer. The settlements were confined to or begun in the northeast corner of the colony, where he went afterward in 1845 to issue certificates, with Dr. Rowlett and Thomas C. Bean,

to such persons as were entitled to them under their contract with Mercer. These certificates were issued to one hundred and eighteen or nineteen settlers for the first year after the 29th January, 1844, of which facts Pillans made due report as shown signed by D. Rowlett, P. J. Pillans, and Thomas C. Bean, which was sworn to by them before John Turner, justice of the peace at Bonham, on August 2, 1855, being exhibit "B" to the original bill and shown on page 101 of the Record. This evidence was accepted without objection and recorded in the land office as proof of the performance by Mercer of his contract. A duly certified copy, authenticated by John J. Groos, Commissioner of the General Land Office, appears at page 105 of the record. This important and well-known report had been of record among the archives of Texas more than twenty years before this suit was commenced. It contains the original covenant and agreement between C. F. Mercer and the settlers, reciting the contract of 1844, stipulating for the performance by the colonists of every condition annexed to their grants and establishing that they had built the colony houses and occupied them, and agreed that they would protect the reservation from being settled by persons not authorized to settle there on by Mercer or the Texas Association. This archive, showing one hundred and nineteen families, gives the name of each family, and the date of introduction as sworn to by them, with the names of the witnesses corroborating their statements. Daniel Rowlett, P. J. Pillans, and Thomas C. Bean were duly sworn and deposed that the list contained a true and accurate account and statement of emigrant families, specially introduced and settled by Charles Fenton Mercer and his associates, then known as the Texas Association, prior to May 1, 1845, upon and within the limits of the grant made by the Republic of Texas to Mercer; and that they then had on hand a deposit with W. W. Porter, in Bonham, of ten kegs of prime gunpowder and nine hundred pounds of lead

This documentary evidence required no corroboration by parol proof, but it has been made so as to show the full facts of actual performance and because the answers of the defendant have impeached the archive mentioned as false and fraudulent, but the defendant has not introduced one particle of testimony to sustain his false allegation. On the contrary, in the answer of R. A. Terrell, a witness for defendant, he testifies that he knew the Mercer Colony; that he was a surveyor, and in the year 1845 he met with a surveying party running a

line in a westerly direction through Henderson County. The surveyor told him he was running lines of Mercer's Colony. He saw the line frequently afterward. (Record, page 273.) The witness again says he was not acquainted with Mercer or any of his associates, and but one of his agents, Wm. M. Simpson, who died many years ago; that previous to January, 1844, there were very few settlers in Mercer Colony, "but there were a great many families settled in the limits of Mercer's Colony, east of Trinity River, during the years 1844, 1845, and 1846. Some of them claimed to be colonists and some were old Texans. . . . They all brought their arms and ammunition with them and assisted each other in building houses and otherwise."

Mercer made many reports to the proper officers, which were duly received, accepted without objection, and recorded as perpetual memorials of his performance of the contract.

Mercer actually entered and took possession of the colony lands, and astonished Pillans by the energy of his efforts in introducing colonists and settlers. Mercer made his first report from Bonham, Fannin County, Texas, July 11, 1844, to the Hon. Anson Jones, Secretary of State, who afterward was President of the Republic when Texas was annexed to the Union. It will be noted that the Colony Acts and Contract withdrew the Mercer reservation from the control of the Land Commissioner, and appointed the Secretary of State as the proper officer to receive and record Mercer's reports. If the secretary had any doubt of the truth of facts stated in the reports, it was his duty to make inquiry, and if suspicious, to refuse to record them among the archives of the State. If the facts were proved as to the immigration of colonists into the Mercer grant, it was the duty of the secretary to record them, which was done. After the secretary passed the report to record it was conclusive evidence of every material fact, and could not be impeached by any of his successors in office.

By this report Mercer informed the State that he had organized the Texas Association. (Record, pp. 89–90.) Another report of C. F. Mercer, duly certified, was filed as exhibit "F" with the original bill and appears at page 82 of the record. It is dated New York, September 25, 1845. It recites that he had visited Texas for the fourth time and that he had contracted with Ripley Wheelock and B. Chambers to sectionize sixteen townships. Mercer states that Col. Smith, captain of Texas Rangers, had declared that he would arrest the surveyors in the colony grant. It was a matter of common notoriety at

the time the contract was made when Texas was plunged in distress, that the news of the grant was received with joy because it protected the frontier from the Indians. Mercer arranged the surveys and maps, but found there was a rush of immigrants into Mercer Colony for private locations without regard to his rights, although these lawless intruders made their entries with a full knowledge of his contract; and that he had made nine hundred surveys subsequent to the date of the colony grant and before the date of his report September 25, 1845. Mercer also sets forth that he had furnished the surveying parties with ample funds; that he had incurred many personal perils; that he went to New Orleans and was detained there by the *publication of the map* which he transmitted with the report and with accompanying contracts and terms of colonization. Mercer provided one thousand copies of these contracts within a fortnight, during which he enlarged the deposits necessary to meet the drafts of his subagents. In the execution of his duties and to perform his contract Mercer had visited Little Rock, New Orleans, Cincinnati, St. Louis, Alton, and the interior of Illinois and Indiana, so as to have the terms of colonization fully advertised. He "also dispersed copies of the map and contracts before mentioned" and engaged editors and papers to invite emigration to his colony, and then came to Louisville. He found in that city the "Texas Emigration and Land Company" which had purchased the Peters' Colony contract. In this company he was a former partner. From Louisville Mercer went to the western counties of Virginia and to New York, where through German houses and the German emigration company, he made arrangements to introduce settlers. Mercer also showed a cash expenditure made in the surveys of $5,235.41. This report was filed and was ordered to record and is certified by A. W. DeBerry, Secretary of State, under the seal of the Department of State, as shown at page 87 of the record.

This report shows that Mercer had made surveys for more than nine hundred families in the colony before September 25, 1845, and that at that time the State officials, without any authority of law, began to violate and obstruct his rights, all of which he promptly reported to the Secretary of State.

The map referred to in this report was duly accepted and recorded and appears at page 113 of the record. It delineates properly, from actual survey, the lines of Mercer's Colony boundary. This is the same map that the defendant, in paragraph XX, of his answer,

alleges and charges was antedated and surreptitiously placed in the Secretary of State's office. The appellant alleged that it appears of "recent manufacture," and "charges that the said pretended map was *manufactured just before the filing of plaintiff's original bill*, and without the knowledge of the Secretary of State was deposited in the office of the Secretary of State."

The map delineates the boundaries of Mercer's Colony as set forth in the grant and described in Paschal's Digest, article 261.

This reckless aspersion upon the dead officers of the State and Mercer had not the least foundation in truth, and is not supported by a particle of testimony. On the contrary the Rev. James Craik, one of the most eminent divines in this country, deposes that he was an original stockholder in the Texas Association, and files his certificate of stock dated August 15, 1845, upon which the map is engraved. This original certificate had been kept by him ever since its date, and had never been out of his possession. (See record, page 221.)

The deposition of Richard Birchitt, an original stockholder at pages 189–199 of the record, shows that he had a similar certificate with the map engraved thereon; and the depositions of Thomas H. Taylor and Clandius Duvall, record, page 205, prove that many similar certificates with maps engraved thereon have been long in existence.

The obstructions alleged to the performance of the colony contract are fully shown by the foregoing report and Pillan's deposition. It originated in the annexation of Texas.

In the year 1844 President Tyler discovered a diplomatic intrigue between England, France, and Mexico, by which Mexico was to recognize the independence of Texas and place the young Republic under a joint protectorate guaranteeing her independence upon condition that slavery should be abolished. Mr. Calhoun was then Secretary of State. Southern men were alarmed at this proposition. It led to angry diplomatic remonstrances and a treaty which was unexpectedly negotiated between the United States and Texas through Mr. Henderson and Mr. Vanzandt, her commissioners. This treaty ceded all the public lands of Texas to the United States, and contained just and ample stipulations that the United States would recognize, confirm, and establish all the Texas land titles, including the colony grants. A large amount of capital owned by the citizens of the United States was invested in Texas land and land-script, and Texas before agreeing to cede her lands guarded their rights with vigilance. But when

the Texas treaty was submitted to the Senate by President Tyler, instead of being confirmed by two thirds of the Senate, as required by the constitution, it was rejected by about a two-thirds' vote.

At that time parties were nearly equally balanced in Congress, and the public opinion of the country was excited. Mr. Clay was nominated for the presidency as a candidate of the Whig party, and wrote a letter from Raleigh opposing annexation. Mr. Van Buren, who was the presumptive candidate of the Democracy for the presidency, was also opposed to annexation, and Mr. Polk was nominated in his stead. The question of the presidency in the approaching election turned upon annexation or no annexation. The States where slavery did not exist bitterly opposed annexation, and the Southern States irrespective of former party opinion espoused it. The powerful State of New York determined the controversy by voting for Mr. Polk.

When Congress met in the winter of 1844–45 the elections were considered as decisive, but annexation by treaty was impossible. Mr. Calhoun and many other able statesmen considered that new territory could be acquired only by treaty. President Tyler fell upon a device to carry annexation by a joint resolution of Congress, which was passed March 1, 1845, expressing the consent of Congress that Texas might become a State of the Union upon certain conditions. By the second condition the State was allowed to "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and *liabilities* of said Republic of Texas, and the *residue* of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States." (Hartley's Digest, pp. 44–45.)

This resolution was passed on the 27th February, 1845, and by a vote of twenty-seven to twenty-five in the Senate. (See Congressional Globe, January 28, 1845, pp. 193, 194–362.) The Texas treaty was rejected June 8, 1844, in the Senate by a vote of thirty-five to sixteen. (See Congressional Globe, part 1, 653.)

If the Texas treaty of 1844 had not been rejected the Mercer Colony case would have been settled thirty years ago in the liberal and just spirit that the Arredondo and Fremont grants and other Spanish and Mexican grants have been allowed and established by this court under the treaties of San Ildefonso and Guadalupe Hidalgo.

In such an event the State of Texas would have been the powerful champion of Mercer's rights and her senators and representatives would have denounced the perfidy of repudiating his colony grant, and the cruel injustice of so long delaying his claim. By an exceptional agreement not permitted to any other of the States of the Union, Texas was allowed to retain the residue of her public lands charged with her debts and liabilities. The appellant now absurdly claims that this residuary right gave the State absolute power to declare Mercer's grant void *ab initio* and at her pleasure to reannex the Mercer Colony lands to the public domain.

The Congress of Texas consented to annexation on the terms proposed, June 23, 1845.

The People of Texas gave their assent to annexation, as required, in convention July 4, 1845. (Hartley's Digest, 47.) And thus Texas was admitted into the Union by joint resolution of the Congress of the United States, approved 29th December, 1845.

It will thus be seen that Texas was not annexed by a technical treaty as in the case of Louisiana or Florida, but by concurrent acts of legislation of the two Republics and by consent of the people. This method was evidently imitated from the act of union which unites the Kingdom of England with that of Scotland, and the subsequent act of union passed in the year 1800, which now incorporates the Kingdom of Ireland with that of England. These acts are *fœdera*, of higher dignity and greater obligation than any treaty, because a treaty may be repealed by an act of Congress, but the compact of annexation is a constitutional bond that no Congress can dissolve nor can it even be terminated by war. The Act that unites Texas to the Union is of supreme force and constitutes an indissoluble bond of perpetual union between indestructible States. Such is the interpretation of the compact by this court in Texas vs. White, 7 Wallace, p. 199.

It was under such circumstances that Congress agreed by the first article of the joint resolution that the Republic of Texas should be erected into a new State, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same should be admitted as one of the States of the Union. The convention framed a constitution which was adopted August 27, 1845, and was transmitted to the President of the United States. (Hartley's Digest, pp. 50 to 83.)

By reference to the debates of Congress, and the legislation of Texas and the United States, and particularly by the diplomatic correspondence of the years 1844–5, it will be seen that all admitted the general principle of the law of nations, that every right of property and vested interest in the dominion ceded must be accepted by the sovereign to whom the cession is made, with all obligations attached thereto under the government of the sovereign making the cession. For these reasons the disposition of public lands and debts and liabilities of the Republic of Texas were of grave importance to the United States. As the United States acquired dominion over Texas with sovereign powers to levy imposts on her commerce and with all paramount rights of sovereignty, it was admitted by all the eminent statesmen of the day that the United States became bound for the debts and liabilities of Texas by force of the acts of annexation.

As to the lands, titles, and other vested property, the following promises were made in the Constitution of Texas, under which she was admitted into the Union:

"SEC. 20. The rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas shall not be divested; nor shall any rights or actions, which have been divested, barred, or declared null and void by the Constitution and laws of the Republic of Texas, be reinvested, revived, or reinstated by this Constitution, but the same shall remain in precisely the situation which they were before the adoption of this Constitution." (Hartley's Digest, p. 73.)

Under this provision it is maintained that no right of property possessed by Charles Fenton Mercer could ever be affected by any legislature, or the officers of the State of Texas after the 29th of December, 1845, when she was admitted into the Union. Consequently the State officers could not, by any acts, impair rights to the lands settled as shown in Mercer's report of the 25th September, 1845, heretofore mentioned.

Again, by article XIII in the schedule, section 4, it is declared that, "All fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas under the Constitution and laws, shall accrue to the State of Texas; and the legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated."

At this time there were no laws for the forfeiture of lands in

Texas; and it has been decided by this court in Airhart vs. De-Massieu, 8 Otto, p. 493, that no law then existed or has ever existed in Texas for the forfeiture of lands. This was averred in the amended bill of complainant, and was not denied by defendant, but the appellant set up an ordinance, dated August 27, 1845, which was attached to the Constitution, declaring that it was the duty of the attorney general of the State, as soon as the organization of the State was complete, to institute legal proceedings against all colony contractors, and if it should be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same had not been complied with according to its terms, such contract should be adjudged null and void. (See record, pages 63, 64, 65, 66, 67, 68; Hartley's Digest, p. 84, and article 77, p. 105; Paschal's Digest, p. 75; Stewart vs. Crosby, 15 Texas, *supra.*)

In the convention August, 1845, adopting the Constitution, the longest debate that occurred was in regard to the forfeiture of the colony contracts. The advocates of the lawless men who had entered the colony reservations urged forfeiture before annexation, because they knew it could never be done after, as it would be in violation of the provisions of the Constitution of the United States. This unjust proposition was in conflict with the Constitution of the Republic of Texas, and was strenuously opposed by her most eminent statesmen. The president, Mr. Rusk, told the convention that such a measure would surely defeat annexation. Mr. Henderson and Mr. Vanzandt, who had negotiated the treaty, concurred in the same view. A long debate as to the Mercer Colony ensued, and the repudiators were defeated by a large majority. Section 20, heretofore quoted, was adopted instead of the proposed forfeiture of the colony contracts.

Judge Woods, in his opinion, examined fully the debates of the convention of 1845 and found that the colonial contracts, including Mercer's, were regarded as liabilities of the Republic by the convention. He cites the pages 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.

It will be seen by the following extracts from the Journal of the Convention of 1845 that the debate as to the colony contracts began August 18 in that body. The committee on general provisions reported section 21, which in substance is section 20, already quoted, declaring that the State of Texas would not divest titles. The president of the convention, Mr. Rusk, offered a substitute for the 21st

section reported. In the preamble it is stated that it is *believed* that the colonization contracts were unconstitutional and with the following provision:

"The legislature is prohibited from extending any further time to the contractors, or dispensing with any conditions attached to them; and they shall, at their first session, pass such laws as may be necessary to institute judicial investigations, for the purpose of inquiring into and annulling said contracts, *Provided*, They are proven to be illegal and void: *Further provided*, The actual settlers already in said colonies shall be guaranteed in their just rights to their quantum of land, as settlers."

An animated debate ensued upon the amendments proposed. Mr. Jewett opened the debate and gave the history of the emigration acts of the Republic inviting colony contracts. In assailing these contracts and the colony contractors, he said:

"They have brought suits against the Republic. In some they have recovered, and others are still pending. Even if the new colonization contracts have created vested rights, I would have them preserved. But I only regard with sympathy the rights of the settlers—those of the contractors I regard only as vested wrongs. These recent contracts were conceived in fraud, and carried on in fraud. They were made with the sovereign authority of Texas, and ought to be subject to all contingencies; and that sovereign authority, whenever it finds it necessary to change the form of government, or expedient to repeal such contracts, has certainly the right to do so."

"I will also vote to suspend them, because by so doing we shall increase the residue of the public domain left for the payment of our debt. This is another cogent reason for me to pursue this course."

The main idea, therefore, of Mr. Jewett was to repudiate the colony contracts and "*increase the residue of the public domain.*" This increase was to be made by seizing seven millions of acres of private property to add to the public domain and by confiscating the colony lands without hearing or judicial proceedings.

Mr. Jewett claimed that all the contracts had been forfeited. He contended that the contract of Miller & Fisher on the Rio Grande, and the contracts with Peters and Mercer had been forfeited.

Mr. Davis predicted that after annexation a flood of emigration would pour into the country. There were at that time no bounty lands for settlers. The plan for inducing emigration was to secure

colonists at the instance and by the influence and efforts of the contractors. Mr. Davis mentions the grant to Mercer by name, and intimated that it was fraudulently obtained against the will of the people. The substance of Mr. Davis's remarks has been incorporated in defendant's answer heretofore quoted. Alluding to the powers of the convention, Mr. Davis said: "We can create and delegate judicial authority, and if we can do this we can exercise it ourselves." This principle is undoubtedly correct under the Spanish law, which knows no limitations upon the powers of the political department of government, but it is surely incorrect under the principles of the common law and the provisions of the Constitution of the Republic of Texas and her laws under which the contract to Mercer was made.

Mr. Mayfield spoke in support of the section as it stood. He charged that the contracts with Mercer and other colony contractors were fraudulently obtained He claimed an absolute right in the convention to forfeit the contracts.

"This act on our part is not that of a mere co-ordinate branch of the government, but it is an act of the deputies of the people in convention assembled, and we refer the subject entirely to the people. It is a kind of adjudication frequently called for by the peculiar circumstances and policy of a country, and one to which so many judicial decisions can apply."

The charges of fraud made against General Houston in regard to the colony contracts, aroused the indignation of Mr. Ochiltree:

"I had intended, upon this occasion, Mr. President, to cast a silent vote without mingling in the discussion. But since the gentleman from Fayette has presented a new issue, every feeling of my own, every principle upon which I act, forbids me to be silent. I am called upon as a juror, without evidence and without law, to pass upon the honesty and proper motives of a man whom I glory in calling friend—Sam Houston. He is directly accused of being a party to a stupendous fraud. And this convention is called upon, without law and evidence, without the form of trial, to give their verdict and publish it to the world. For this issue I am not prepared. If a fraud has been committed affecting the rights of the people of Texas, I want the case tried, sir. If I have pressed a man to my bosom and called him my friend who could be guilty of an enormous crime, I want it known. If he has been a party to this great criminal transaction by which the rights of the war-worn soldier have been bartered away;

if he has committed an offense which would stamp him as a felon throughout Christendom, I want it made to appear in characters so distinct that every man, woman, and child may read and pronounce his deep damnation there. This is the issue now presented before this House by the gentleman from Fayette. If he believes that such a fraud has been committed, he is justifiable in making the charge; but if I consider it unfounded, I am also justifiable in repelling it. If Sam Houston is guilty I want it proven; if proven, he is stamped a villain; but if not, he will do as he has often done before, rise triumphant above the petty attacks of his enemies.

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"I want the courts to try and adjudicate these cases; I want them to inquire into the facts; to read the law and hear the evidence. If a fraud has been committed it has not been by General Mercer alone; it is a double fraud. Whenever it shall be so pronounced by the judicial tribunals of the country I will then believe it; I will then acknowledge it, but never until then."

Mr. Mayfield said in reply:

"I think that it is not the issue before this convention. It was asserted by a gentleman upon this floor that a fraud had been committed upon a certain occasion; but he contended that it had been on the part of Charles Fenton Mercer. If, then, I argued, it was true, as he insisted, that Charles Fenton Mercer had been guilty of a fraud upon the country, whereby a large portion of the public domain was to be wrested from the heirs and descendants of those who had fought as gallantly as Sam Houston upon the battlefield, it was equally true that Sam Houston himself had been a party to it, because he signed the contract, as I understand, conjointly with Charles Fenton Mercer."

Mr. Ochiltree replied, maintaining with vehemence that the convention had no power to pass upon the questions of fraud or no fraud, and daring an investigation of the inuendoes and calumnies against Houston.

Mr. Rusk was opposed to the colony contracts, but still more strongly opposed to declaring their forfeiture by the convention.

"I shall vote against the twenty-first section, because if these contracts are constitutional, this convention may have the power, but I deny the right, to interfere with a single vested right. That contains a sort of admission that they are in accordance with law.

"And I take this broad ground, that when this Constitution goes

before the Congress of the United States, that body may imagine that we are here destroying legal and vested rights. If they should believe that, it is competent for them, and it would be their duty, to reject it. The gentleman from Robertson referred us to our Constitution of the Republic of Texas. Sir, that Constitution was made under very different circumstances from this. We are making here a State Constitution. We have acknowledged the supremacy of the Constitution of the United States of America. We are going into that confederacy, and therefore given them the entire right of making our Constitution. In this Constitution is an article which says that no State shall pass any law impairing the obligation of a contract. And I would be unwilling, however bold I might be, when we could reach the object by a different route, to run a tilt against the Constitution of the United States.

"Again, it is a principle of law, as has been stated here, that if we put it out of the power of the contractor to comply with his contract, the obligation rests upon us to comply with that contract to the letter. It is not only a principle of law, as held in the *celebrated Arredondo case in Florida, which went up to the Supreme Court of the United States*, but it *is a fundamental principle running through all contracts.*

"Then, sir, this twenty-first section might involve us in many difficulties, and, under the circumstances, I shall feel myself bound to vote against it."

Mr. Vanzandt was one of the commissioners who had negotiated the treaty with Mr. Calhoun which was rejected by the Senate. He was a member of the Congress of the Republic when the emigration acts were passed, and gives a history of the policy that led to the legislation inviting emigrants.

"What was the original object in view in authorizing these contracts? Our frontier was exposed to the inroads of the merciless savage; husbandmen were frequently called from their homes and their crops to defend themselves and the adjacent country. The country was desolated, the population was receding, and that region which, a short time before, was in a flourishing condition, and bade fair to rival any portion of the country in actual prosperity and wealth, was soon to become a desolate wilderness. At this moment these individuals came forward and offered to contract for the introduction of a certain number of families upon the exposed frontier,

sufficient to give protection to the old settlers. I was in Congress when the law passed, and the question of constitutionality, so far as I recollect, was not even agitated. The only question then considered was one of policy."

Mr. Lipscomb, the most eminent jurist in the body, stated calmly the reasons why he could not vote for the forfeiture of the colony contracts.

"In stating the reason why I can not support the section as reported by the committee and amended by the gentleman from Fayette, I will remark that it is with exceeding reluctance that I shall vote against the amendment and the section. But I am influenced in so doing by considerations which will not allow me to indulge any preference or any freedom of will which I might be disposed to exercise upon this occasion. It has been a principle with me, which has grown up with my growth, and I believe increased with age, to have something like veneration for individual rights. I believe that those rights, in all countries governed by law, should be subjected but to one test, that of the ordinary tribunals of the country. I believe that any other mode of adjudication is capricious, and subject occasionally to very great injustice. I have been accustomed to think that whenever a tribunal decides any matter of controversy, it should hear both parties, and weigh the evidence on the one side and on the other. We are called upon here to say that these contracts, solemnly entered into between the Republic and these individuals, shall be suspended and shall cease, thus directly destroying the contract, and directly interfering with individual rights. I do not believe that we could, under any circumstances, go into the inquiry whether these contracts were foundod in fraud or not. The gentleman who addressed the House in favor of the amendment, sustained it upon the ground that fraud in the beginning made them void *ab initio*. I am willing to say that they are fraudulent and void for the sake of the question; but if I were of that opinion, it would not justify me, standing here as a member of a convention called for the purpose of forming a constitution embodying the great principles of the rights of man, that they were so. All we could do would be to provide a mode of instituting an inquiry as to that fraud.

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"There is another objection, which is with me a prominent one. It will not be denied by any member of this House, conversant with

constitutional law, that if we were already in the Union, and should offer an act of the legislature or the State embracing this very provision, no constitutional lawyer would say that act would be held to be constitutional by the Supreme Court of the United States; any lawyer would say it was void—unconstitutional and void. We are told, however, that we are not yet in the Union, and may engraft into our Constitution a principle repugnant to that of the United States with perfect safety—that there is no power that can revise it—that the Supreme Court can not revise it. I do not think so. I believe that if we should be received, and if there should be any principle in our Constitution conflicting with that of the United States, it will come under the cognizance of that court, and be declared unconstitutional. But suppose we hold that it would not be subject to the revisal of the Supreme Court, and that, if we go into the Union now, it can not be questioned hereafter. Are there not just grounds to believe that those in the United States Congress who are opposed to the annexation of Texas, as one party, and those who may conscientiously believe this principle repugnant to the Constitution, as another party may, when acting together (for we have not many friends to spare in the Congress of the United States), form a sufficient force to defeat our annexation? Why so? Because this section is repugnant to an express provision of the Constitution of the United States. The latter clause of section 10 of the first article of that Constitution provides that no State shall pass any law impairing the obligation of a contract. Now, is it within the bounds of a reasonable probability to suppose that those men who feel indifferent toward us at the least, and those who may conscientiously believe this to be in violation of the Constitution, would not seize hold of this provision and make it an objection to the reception of our Constitution? Would they receive our Constitution under these circumstances? Would they take in a people as an independent State who should have engrafted in their Constitution a principle repugnant to that of the United States? I think they would not.

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"Believing, therefore, that we should not jeopardize our admission into the Union with this Constitution, no consideration could induce me to vote for this section as reported. And I have the same objection to the amendment. . . . The character of one individual, whose name has been handled very roughly to-day, once stood very

high in his country's annals; few men have stood higher for virtue, talent, and political influence than Charles Fenton Mercer.

"If he had that influence now, and we should undertake to rescind his contract, we can not expect that he will not attempt to prevent it. The influence of all those opposed to us will be combined, and we know from the newspapers that the northern people are opposed to our annexation, and are looking out for something to take hold of. It is true they are not looking in this quarter—they are looking for something relative to slavery; but the same men will lay hold of any other objection just as soon as that. Their object is to defeat the annexation of Texas, and they will defeat it if possible by availing themselves of all the means within their reach. And I can tell gentlemen, as lightly as they think of this matter now, they may think of it hereafter with regret, as I know that most of those who are now supporting this provision are devoted to the cause of annexation. I had intended to rest content with giving my vote against this section, without making any remarks upon the subject, but the more I have looked at it the more fully satisfied have I become that it is repugnant to the Constitution of the United States; that it is in violation of the principles of abstract justice, and would be a ground for our rejection, and I felt it my duty to give, in a brief way, the reasons why I shall vote against it."

Volney Howard, one of the most distinguished lawyers in the convention, and who afterward became a member of Congress and U. S. senator, exposed with great power and eloquence the shocking injustice of the course proposed, the illegality of forfeiting the contracts by an edict of the convention, and the certainty that such a measure would defeat annexation.

"It is proposed by an arbitrary edict of this convention to abrogate and annul the contracts for colonization into which the Republic has heretofore entered. It is argued that we should pursue this extraordinary course; first, because these contracts were unconstitutional; second, because they were fraudulent; and third, because the public policy of the country has changed since they were entered into.

"In order to support this measure, the advocates of it have found it necessary to maintain that this convention has power to do all things, unrestrained by any rule save its own notions of expediency. I deny this position at the very threshold of the inquiry. The idea of *unlimited* power has no anchorage on this side of the Atlantic; it is

associated only with the bowstring of the Sultan, and the knout of Czar. To maintain such a position is to confound *right* with brute force.

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"In England, where the Parliament is declared omnipotent, it is a well-settled axiom of the law that a statute contrary to the law of nature is void and need not be obeyed.* Nor is this the mere speculation of the philosopher in his closet. It is a part of the jurisprudence of the country. In the cases of Calder & Ball, Fletcher & Peck, and Terset & Taylor,† the judges of the Supreme Court of the United States hold that a law violating the social compact, or natural justice, would be void on general principles, independent of constitutional inhibitions."

In replying to and refuting the absurd idea of impeaching the colony contracts for fraud or as unconstitutional, because they operated as monopolies, Mr. Howard continued:

"How is it proposed to conduct this proceeding? Fraud is charged in debate with the wildest declamation, without the shadow of notice, without a title of proof. Without so much as taking evidence before a committee, it is proposed to annul the solemn contracts and grants of the government! I say nothing at present of the monstrous injustice of so vile an act of repudiation; I deny the *power* of this convention to perpetrate the deeds; I controvert the power of this government, acting through a convention, on a charge of fraud, to resume its own grant by an *ex parte* proceeding which denies a hearing to the grantee.

"The position that these colonial contracts are unconstitutional is liable to the same objection. It is a judicial question, and must be judicially examined, after notice and a hearing allowed to the grantees. But the position is clearly unfounded. It goes upon the ground that inasmuch as there was a general lien upon the public lands for the payment of the soldiers and other public creditors, the grants to the contractors were unconstitutional. It is not pretended that there was any specific lien on the particular territory covered by these grants. The report of the General Land Office shows, that after discharging all military claims there will be left 180,000,000 of acres of public domain, which will be more than sufficient to discharge a public debt

*1st Co. Litt. 341, a; 1st Bl. Com., 58, 41, 43; Legal Maxims, 17.
(†3d Dallas, 386; 6th Cranch, 87; 9th Cranch, 43.)

which no one estimates at more than $10,000,000. These contracts are grants of all the territory within certain specific and descriptive boundaries, to be reserved for settlement by the grantees of a certain number of families in a particular way, and within a certain time, to which families the contractors are to give not more than 640 nor less than 160 acres of land, with a further provision that to the government is reserved every alternate section, with a right to the grantee, in some of the contracts, to purchase the alternate section by paying $12 in cash and $640 in the liabilities of the Republic. It will be admitted that the contractors have paid a sufficient consideration to support the contracts. And in contemplation of law at least the advantages arising from the settlement of one half of the land, with an industrious population, will augment in an equal degree the balance of the other half which is reserved to the government. It will also be presumed that the $652 for each alternate section, which the contractor pays, would be a fair compensation for the whole if no settlement had been made. In point of fact, also, it is questionable whether the government could have sold the land for as much in its own liabilities as the contractors have stipulated to pay. My own opinion is that these contracts have increased the ability of the government to discharge its debts, and that more will be realized from the alternate sections of a populated country than could have been obtained from the whole of a district which would have remained for many years a mere hunting-ground for the Indians. But whether the policy and the contracts were wise or unwise, in a financial point of view, can not affect their validity in any legal bearing of the question, as it is not doubted that the legislature had the right to sell the public domain, and that these grants were made under its authority expressly delegated for that purpose. Admitting, however, for the sake of argument, that the law and grants are clearly unconstitutional, still I maintain that the question can not be examined in this forum, but is open to judicial inquiry only.

"It is urged by the member from Fayette, Judge Baylor, that since these contracts were entered into, annexation has taken place and the policy of the country is changed, and that we have a right to annul these contracts and take the land for public use."

Judge Baylor, alluded to as the member from Fayette, voted with the members who urged the forfeiture of the colony con-

tracts, and is the same judge who afterward sat in the Navarro District Court and entered the so-called judgment of forfeiture in the case of the Governor vs. C. F. Mercer and his associates.

The amendment was adopted by a vote of thirty-tow to twenty-three.

The friends of annexation became alarmed. Mr. Rusk expressed his opposition to the colony contracts, but said:

"If I could do so without a violation of the Constitution of the United States, and without endangering the question of annexation, no man would go further. The Constitution, sir, which we shall here form will be a State law; not the fundamental law of a separate government, but the fundamental law of a State of the Uwited States, and subject to the Constitution of the United States, and that Constitution declares emphatically that no State shall pass any law impairing the obligation of a contract. Then, sir, if we adopt the twenty-first section, I shall feel from the moment it is adopted that the fate of our Constitution in the United States is sealed. And I am not alone in my views of the subject, A gentleman learned in the law, a gentleman of age and experience, who sits near me, one who is not as easily moved by passion and feeling as I might be, after having reflected well upon the subject, entertains the opinion that if this clause is adopted our Constitution will be inevitably rejected. Let us pause, then, sir, and reflect. What will be the consequences? The people of this country are already highly excited upon the question of annexation—the hope of this event animates the bosoms of them all, from the Sabine to the Rio Grande. Everything is sought for with avidity which has the most remote bearing upon the subject. I, sir, in common with the people, believe that our hopes of futurity depend upon the consummation of this measure. Whether they do or not, the people believe it. The affairs of the country would be thrown into confusion, and turmoil and anarchy would follow the rejection of our Constitution by the United States. But sir, if we are true to ourselves, we need entertain no fears."

The convention saw the danger, and members changing their votes, the body refused to forfeit the colony contracts.

The indulgence of the court is asked for quoting these passages at length from the Debates of the Convention of 1845, but as the volume which contains them is rare, and perhaps may not be found even in the Congregressional Library, they are inserted for the greater convenience of the court.

It was under such irresistible evidence Judge Woods decided that the Mercer Colony grant was a liability of the Republic which was as complete as a sovereignty could assume. He further held that the resolution of Congress created either a treaty or a contract, but doubted whether it should be considered as a treaty, because the agreement was not made by and with the advice and consent of two thirds of the senators present, as prescribed by sec. 20, article 2 of the Constitution. This has already been admitted. The court, however, held that whether the agreement for annexation was a treaty or a mere contract, it was alike within the clause of the Constitution of the United States which forbids a State from impairing the obligation of contracts. (Green vs. Biddle, 8 Wheaton, 1.)

The words "treaty," "compact," and "contract," as used in the Constitution of the United States, relate to three different classes of agreements. A contract is an agreement between private citizens. It is invalid unless based upon a sufficient consideration, or if it be tainted by fraud or duress. It is enforcible or may be canceled by an ordinary municipal court. But a treaty is an agreement between sovereign and independent nations and can not be set aside by any municipal court. A compact is an agreement between States either, or both of whom may not be absolutely sovereign and independent. Such was the compact between Virginia and Kentucky adjudicated in Green vs. Biddle, 8 Wheaton, 1. But the acts of annexation were as heretofore stated a *foedus* of higher dignity than any contract, compact, or ordinary treaty between nations. (See the case of Texas vs. White, 7 Wallace, pp. 724, 725, to 736 inclusive.)

If, therefore, the Mercer contract is one of the liabilities contemplated between the high contracting parties the statutes of limitation of Texas, which can have no extra territorial force, can not have any application, because such statutes can not affect treaties or international agreements, or bar any rights secured by treaty. Therefore, the defense set up by the appellant of lapse of time and laches can not be allowed, nor can any denial of the trust, for the reasons assigned by Judge Woods and Judge Pardee, as well as for the still higher consideration that no denial of land commissioners, or governors, no rumors of old settlers, and no calumnies against the dead can repeal a treaty or enable a statute of limitations to bar rights secured by the high contracting parties.

But by the ordinary principles relating to the denial of trusts be-

tween private parties, an express trust of lands is never barred by the statute of limitations or lapse of time so long as the trust continues. (Story's Equity, sec. 1520; Angell on Limitations, sec. 468; Bell vs. Warren, 39 Texas; Wagner vs. Beard, 7 Howard, 234; Kane vs. Bloodgood, 7 Johnson's Chancery; Vardeman vs. Lawson, 17 Texas, 10; Newson vs. Davis, 20 Texas, 419; Fisher vs. Rutherford, 1 Baldwin Cir. Ct. Rep. 188; Bowman vs. Wathen, 1 Howard, 195; Piatt vs. Vather, 9 Peters, 405; Bell vs. Warren, 39 Texas, 106.) In this last case thirty-five years had elapsed, but lapse of time was not allowed to bar the demand.

The Texas decisions are in harmony with the general law and the decisions of this court. (See Williams vs. Conger, 49 Texas, 483.)

The ordinance was never transmitted to the President of the United States as part of the Constitution under which Texas was admitted into the Union. It was withheld for fear that it would cause the resolution for annexation to be rejected. It would have bred great opposition from citizens of the United States having large capital embarked in Texas lands. The vote of a single senator would have defeated annexation and Mercer and the other colony contractors might have had influence enough to secure from old friends and colleagues such a result. The vote of Mr. Benton was very dubious, as he was bitterly opposed to annexation. If he had voted against the measure it would have been a tie vote and annexation would have failed.

The nature and character of the ordinance of 1845, as it affects the colony contracts, was elaborately considered in 1855 in relation to the Peters' Colony claim by the Hon. Caleb Cushing, Attorney General of the United States. The ordinance was reviewed with the usual ability of Mr. Cushing, and can be found in vol. 8 of the Opinions of Attorneys General of the United States, p. 522 to which this court is referred. The ordinance applies to all the then unsettled colony contracts including that of Mercer. It is evident, too, that by the very terms of ordinance neither the attorney general nor any officer of government could institute a suit for forfeiture upon it, because it is not self-executing and did not contemplate any proceeding until "*after the organization of the State should be completed.*" So much therefore of the answer of the appellant as alleges the ordinance "became a part of the fundamental law of the land and that the organization of the State made by said convention [was] completed

February 16, 1846," is untrue. The acts of 1846 did not provide a method for forfeiture as already stated, and no act yet exists prescribing such a method. (Airhart vs. Massieu, 8 Otto, 493.)

Another report was made by C. F. Mercer to the Secretary of State, dated Tallahassee, Florida, December 31, 1845, which was accepted and recorded as an archive in the Department of State, a copy of which duly authenticated is in the record, pp. 171–180.

In this report Mercer shows the organization, names, and interests of the association; the impediments to the surveys; and the contract with Claxton Taylor to sectionize the land. The contractor also states that he had introduced more than two hundred families in the colony prior to May 1, 1845, instead of the one hundred and nineteen families mentioned in the deposition of P. J. Pillans; that he had taken proper covenants from the colonists to perform the contract; and that there were two hundred and twenty families introduced before June 1, 1845, and settled in the colony, and that such was the emigration that there would be five hundred families in the colony before the 1st of January, 1846. Mercer says:

"Various causes have conspired to promote emigration to the portion of Texas comprehended in the above contract. The undersigned, in the prosecution of his duty as chief agent of the Texas Association, has made seven voyages by sea, traveled more than eight thousand five hundred miles by land, including journeys of one thousand three hundred miles on horseback through the colonial lands and near the frontiers of Texas. He has published more than two thousand handbills; had one thousand one hundred maps lithographed of the colonial lands; advertised the terms of emigration in more than twenty newspapers, printed in Arkansas, Missouri, Illinois, Indiana, Ohio, Virginia, Florida, New York, and the District of Columbia; and carried on an extensive correspondence throughout the United States, diligently devoting two years of his life to the fulfillment of his contract with the Texas government and his duty as chief agent of the Texas Association." (Record, page 174.)

The witness of appellant, Terrell, page 269, record, and Pillans's and other evidence corroborate the truth of this report and shows the zealous and incessant efforts of Mercer to establish his colony, and his success in overcoming the numerous obstacles in the way of performing his contract.

The other reports of Mercer, of which he made seven in all, show

that he fully and faithfully performed all the conditions annexed to his grant so that his estate became indefeasible, leaving only a dry trust or the naked legal estate in the State of Texas. It was no donation of land, as pretended in the answer of appellant, but one earned by extreme toil, large expenditures of money, and incessant, energetic, and successful efforts. The Mercer colonists were the vanguard of civilization in northern Texas, for when he carried in his first one hundred and nineteen colonists and surveyed the lands the State of Texas was too poor even to pay for the surveys, and had no money to employ troops to defend her frontier. The consideration, as the record shows, was large, valuable, and adequate for all the rights obtained.

The amended bill of complaint makes these allegations:

"Your orator charges that the rights of Mercer and his associates and assigns, and of your orator and of the Texas Association were and are secured by the force of the grant to Mercer so far as the land included within the colonial limits are concerned, and were and are further secured to them by the express trust declared in the articles of annexation as aforesaid as to all lands which at the time of the annexation were vacant and unappropriated.

"Your orator further charges that at the time when Mercer concluded his contract with the Republic of Texas the same was authorized, guaranteed, and protected by the Constitution of the Republic of Texas then in force and by the laws of said Republic, and that there was then in force no law or method for determining how lands should be forfeited or land-grants repealed or canceled or possession resumed by the Republic of Texas so as to re-annex the Mercer Colony lands to the public domain of Texas, and no such law was ever passed prior to the admission of Texas into the Union or up to the time of the creation of the trust upon the public domain as hereinbefore stated. He charges that it never was the true intention or purpose of the deputies of the people of Texas in convention assembled to declare any forfeiture of the colony contract or to establish by constitutional enactment any method for determining what lands, if any, might have been forfeited, or how forfeitures should be declared, and no such declaration was made by said convention authorizing any proceedings to forfeit the Mercer grant or any colonial contract.

"Your orator avers and charges that from the time of the annex-

ation of Texas to the Union up to the present time the Legislature of Texas has not provided a method for determining what lands may have been forfeited. He charges that no method has ever been provided by the constitutional convention of 1845 of the State of Texas, or by its legislature at any time, to revoke the grant of Mercer, or to repeal the same, or to resume the lands granted, or to reattach the said lands to the public domain, or to authorize any officer so to do, or to re-enter on said lands or any part thereof, in behalf of the State of Texas, or to enforce any forfeiture thereof, or to evict and oust Mercer and his associates therefrom, or disturb his or their peaceable possession of said lands." (Printed record, p. 47.)

The defendant answered at great length, on pages 59 to 65 of the record, denying the performance of the contract in regard to the conditions subsequent annexed to the grant, and with many roundabout statements setting out matters in evidence based upon the public debates; as to the ordinance of August 27, 1845, and then pleads a pretended forfeiture, at pages 65 to 68, as *res adjudicata.*

The passage quoted above is only a portion of appellant's plea in bar. The preceding part is very long, and incorporates the speech of Mr. Kauffman in the convention as to the hearsay rumors of the fraud of President Houston set up by the appellant.

The latter part of the answer, setting up the defense of *res adjudicata* is as follows:

"In the ordinance hereinbefore referred to, adopted by said convention August 27, 1845, it was declared in the preamble thereto that the various contracts which had been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas, were believed to be unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upward of seven millions of acres of the public domain of Texas in the hands of a few individuals, when in truth the citizens, soldiers, and creditors of the Republic of Texas had by the laws and constitution of said Republic a clear and indisputable previously-subsisting right to locate upon the domain thus attempted to be assigned to said contractors. And it was by the said ordinance ordained and provided "that it should be the duty of the Attorney General of said State, or the district attorney of the district in which any portion of the colonies might be situate, as soon as the organization of the State

should be complete, to institute legal proceedings against all colony contractors who had entered into contracts with the President of Texas; and if upon such investigations it should be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same had not been complied with, according to its terms, such contract should be adjudged and decreed null and void; provided, however, that all actual settlers under any such contract should be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And that in all suits brought by or against any contractors, or any person claiming under, by, or through them, or either of them, it should be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead: and the party might introduce testimony to prove the claim or title to have been forfeited as well as for frauds, or illegality, or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas should be deemed good and valid in law, in all such suit or suits in said State.

"It was by the said ordinance further provided that the legislature of said State should be restrained from extending any contracts for settling a colony and from relieving any contractor from the failure of the conditions or the forfeiture accruing from non-compliance with the contract, and that said ordinance should be presented to the people for their adoption or rejection at the same time the constitution made by said convention should be presented to them, and that the returns of the vote taken on said ordinance should be made to the office of the Secretary of State of the Republic of Texas at the same time the votes for the constitution were returned. That said ordinance was adopted by a vote of the people of said Republic, and thereby became a part of the fundamental law of the land and the organization of the State under the Constitution made by said convention, completed February 16, 1846. That in obedience to and in conformity with the provisions of said ordinance, J. W. Harris, Esq., the Attorney General of the State of Texas, within a short time after it took effect, to wit. on the 11th day of October, 1846, filed in the District Court of Navarro County, in said State, "a suit in the name of A. C. Horton, Governor of said State, for and in behalf of said State, as plaintiff, against Charles Fenton Mercer and his associates as

defendants, the said county of Navarro being situated within the limits of the said pretended Mercer Colony. That it was alleged in the petition in said suit, among other things, that the said Mercer and his associates, and his and their representatives, failed to introduce and settle one hundred families on lands in said contract described (and agreed to be set apart), according to the tenor thereof, prior to the first day of May, 1845, and also failed to introduce and settle on the lands in said contract described (and agreed to be set apart) two hundred and fifty families on or before the expiration of two years from the date of said contract, according to the tenor thereof, and also that said contract was illegal, and made in violation of the Constitution of the Republic of Texas, and was therefore null and void from the beginning. The said petition, among other things, prayed that the said contract might be decreed to be invalid, and null and void from the beginning. That in an amended petition filed in said suit by said J. W. Harris, Attorney General, it was further alleged, among other things, that the said Mercer and his associates did not survey, designate, and mark the boundary of the territory thus set apart for them for purposes of colonization, by the terms of the contract aforesaid, as by law and the spirit of said contract they were bound to do. That the terms of said contract fix the southern boundary of said territory so set apart as aforesaid at a point on the River Trinity opposite Cedar Creek, crossing said River Trinity at the lower bank of Cedar Creek, running thence to the mouth of the Aquilla on the River Brazos; that said Mercer and associates had run a line from the Trinity River to the Brazos, but not in accordance with the calls of the contract; that said line did not extend from the lower bank of Cedar Creek on the River Trinity to the Aquilla on the River Brazos, as by the terms of said contract it should, but said southern line, commencing at a small spring branch on the River Trinity, never known as Cedar Creek, some eighty miles below the Cedar Creek specified in the contract as the call on the Trinity River from which a line should extend to the mouth of the Aquilla on the River Brazos, including thereby a region of country, in a triangular shape, containing some three thousand square miles more than by the terms of the contract they were entitled to. Also that the said Charles Fenton Mercer and his associates had violated all and singular the agreements and covenants contained in the said contract of colonization.

"Defendant further alleges that the said Charles Fenton Mercer and his associates, the defendants in said suit, were duly and legally cited to appear and answer the petition in said suit, in accordance with the laws of Texas, and that thereafter, to wit, at the September term of the District Court in and for said Navarro County, A. D. 1848, to wit, on the 25th day of September, 1848, the said suit of A. C. Horton, Governor, *vs.* Charles Fenton Mercer and his associates was heard in the District Court of Navarro County aforesaid, and upon a full hearing thereof by and before said court, among other things upon the verdict of a jury therein duly rendered that the contract of colonization made and entered into between Sam Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the 29th day of January, 1844, be and the same is hereby adjudged and decreed null and void.

"Defendant further alleges that the aforesaid judgment and decree of said court still remains in full force and effect, and in no wise reversed, satisfied, or made void, all of which will more fully appear by the record and proceeding in the aforesaid suit in Navarro County.

"Defendant further alleges that the said colonization contract described in the original bill of complaint in the cause, and filed therewith as exhibit "A," and upon which the said plaintiffs' said bill of complaint is based, is the identical same contract set forth and described in the said suit in the District Court of Navarro County wherein A. C. Horton, Governor of Texas, was the plaintiff and Charles Fenton Mercer and his associates were the defendants, and that the same identical contract which by the judgment and decree of said District Court of Navarro County, rendered and entered in said suit as aforesaid, was adjudged and decreed to be null and void.

"Defendant further alleges that under and by virtue of the Constitution and laws of the State of Texas, the said District Court of Navarro County was a court of competent and ample jurisdiction to hear and determine the aforesaid suit of A. C. Horton, Governor, *vs.* Charles Felton Mercer and his associates, and render and enter therein the aforesaid judgment and decree which it did render and enter therein as aforesaid.

"Defendant further alleges that the same identical subject-matter involved in said suit in said district court is involved in this cause, and that the parties in interest are in privity identically the same.

That the said proceedings were in all respects fair, the said Mercer and associates being represented, as the defendant is informed and believes, by two of the most distinguished lawyers in the State, to wit, by George W. Paschal and William G. Hale, Esqs.

"And this defendant insists that the matters and things set up in complainant's original bill of revivor, and supplement and amended bill, are *res adjudicata*, and barred by the said judgment of the District Court of Navarro County, and he claims the same benefit of this defense as if he had availed himself thereof by plea in bar.

"And this defendant, answering further, says that a certified copy made December 11, 1848, of the proceedings in said court in said cause, and of the said judgment and decree shortly after its rendition by the said District Court of Navarro County, were deposited in the General Land Office of the State of Texas, for the observance of said Land Office, and that the same has remained on deposit in that office to the present time, and is now on deposit there, and that the said judgment and decree of said court has been recognized by each and all of this defendant's predecessors in office of Commissioner of the General Land Office, as valid, legal, binding, and final, and has been so recognized by this defendant, and he believes by all other departments and officers of the government, and he still so regards it, and has never at any time heard the validity, legality, and conclusiveness of the said judgment or decree doubted or called in question, until the institution of this suit, and that the time by law allowed for the filing of a bill of revivor, taking an appeal, prosecuting error, or otherwise reversing or bringing in question said judgment or decree, expired, as this — is advised, more than a quarter of a century ago. That the said judgment and decree was mentioned and expressly recognized in an act of the Legislature of Texas, entitled "An act for the relief of the settler in the territory commonly known as Mercer Colony," approved January 24, 1852; and in said act it was expressly declared that nothing therein contained should be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract, or rights growing out of the same."

In order to support and prove the allegations of the bill, the complainant at the final hearing produced and read upon the trial a certified copy of the Mercer Colony grant, marked exhibit "A," with the bill, the nature of which has already been discussed. No objection was made to this evidence.

There is no difference in equity between the effect of patents in due legal form, and a grant from the State like that of the Mercer Colony. In such cases legal and equitable estates are upon the same footing. It was therefore maintained by the appellee, that the grant, by its terms, separated the Mercer Colony lands from the public domain as soon as it was recorded and delivered to Mercer. There was no condition in the grant precedent to the vesting of the title in Mercer.

The very nature of the grant, requiring survey within a reasonable time, not only transferred the title but the possession to Mercer, so that his documentary and possessory title were united, and became perfect. This court in the case of the United States vs. Schurz, *supra*, has held that the power of the land department over such evidences of title ceases when the last official act, necessary to transfer the title, is performed.

Mercer, however, actually received the grant; accepted it; notified the government; entered into actual possession; surveyed the land; introduced colonists; and built a warehouse or magazine, as Riggs, the clerk of the Navarro court, deposes.

Riggs, the chief witness for appellant, says in answer to cross-interrogatory 16 (record, p. 319):

"Charles F. Mercer built a warehouse on the east bank of Trinity River, and the western boundary of Henderson County. It was represented to contain ammunition and stores for settlers, but I never saw it. When the suit between the Governor and Mercer was finally decided, I issued, as clerk of the district court, an execution against Mercer and directed it to the sheriff of Henderson County. He levied it on the warehouse. This is all I know about the matter."

This shows that Riggs then thought the colony lands had not been forfeited, nor the warehouse, for otherwise he would not have levied his execution on it after the pretended forfeiture as the property of Charles Fenton Mercer and his associates. This fact is far more important than any recollection of Mr. Riggs's more than thirty years after of what was the general understanding of himself, the lawyers representing the "locative interests" of the squatters, or rumors amongst the "old Texans" upon the constitutionality of the Mercer grant or its forfeiture by the proceedings in Navarro County.

The complainant having shown documentary title with documentary evidence of the performance of the conditions annexed to the grant,

and by the testimony of many witnesses, performance of the conditions, it devolved upon the Land Commissioner to sustain his allegation that the grant had been duly forfeited and re-annexed to the public domain.

To sustain the alleged forfeiture the defendant produced and read the transcript of the so-called record from the District Court of Navarro County. (Record, p. 327.) The complainant objected to the introduction in evidence of this document and moved to reject and exclude it, but the court overruled the objection and admitted it in evidence for defendant. (Record, p. 331, 320.)

After inspecting the Navarro record, Judge Pardee held that it was an absolute nullity. (Opinions in pamphlet, p. 23.)

The fatal defect was that the record contains no proof of service of process or citation by publication or otherwise, bringing Mercer and his associates within the jurisdiction of the court. The court held that the record must show affirmatively that the forms of service provided by law had been complied with before the judgment of a court otherwise having jurisdiction could have the force of *res adjudicata*. The court further considered that the recital in the alleged judgment in these words, "And it appearing to the court that service had been perfected," could not cure the defect.

This is self-evident, because the judge can not serve or make return of process instead of a sheriff, as he is a judicial and not a ministerial officer, and consequently for stronger reasons his mere recital can not have a greater effect than his direct and positive act.

Judge Pardee, in his opinion, intimates that other glaring defects in the Navarro record "strike the entire proceedings with absolute nullity." (Pamphlet opinions, p. 24.)

The first defect apparent on the face of the record is that the petition is filed in the name of Albert C. Horton *acting* Governor of the State of Texas vs. Charles F. Mercer and others. No action could be instituted unless in the name of the State of Texas vs. Mercer and others. The proceeding was to divest the title and possession of land and to forfeit the landed estate of the defendants for alleged breaches of the conditions annexed to the grant. This omission was generally understood by the bar and the members of the Texas Association to invalidate the pretended forfeiture. Richard T. Birchitt, one of the original stockholders, whose deposition appears at pages 201, 202, and 203 of the record, deposes that an assessment had been made on the

stock and that he had written to his friend Thomas H. Duval, as to whether it would be advisable to pay it or not. The witness files a memorandum in Duval's handwriting (page 204), that Crockett had issued 1206 [1256] certificates to colonists. Judge Duval answers Birchitt in a letter dated Austin, Feb. 22, 1854, setting out that he and his brother-in-law, George W. Paschal, had prosecuted the claim for Hancock before the legislature, and that the bill for Hancock's relief was reported favorably by a large majority of the members of the Judiciary Committee, composed of the most intelligent lawyers in the Senate, who recommended its passage. He had scarcely a doubt that it would have passed both houses, but it eventually failed. He stated "that the judgment by default rendered by the District Court in Navarro County, in 1848, against Mercer and his associates would be *no bar to the suit* he intended to bring against the colonists. That the judgment was and is an *absolute nullity* for several reasons. One is, that Mercer's associates had no notice of the institution of the suit, as their names were not included in the citation which was made by publication. Another is that the suit was brought in the name of the Governor of the State, when the Supreme Court had decided that this would not do, but that every suit in behalf of the State must be brought in the name of the State, etc. Indeed, that this was clearly required by a section of the State Constitution."

Duvall accordingly advised Birchitt to pay Hancock the assessment of three hundred dollars on his three shares of stock, which was done.

This letter also repels the attempt made by the defendant through witnesses, to amend the record by showing that Mercer had appeared in Navarro by his attorney, George W. Paschall; because the answer alleges truthfully that he was one of the most distinguished lawyers of the Texas bar, and it would be wholly incompatible with professional honor or common honesty for Paschal and Duvall to accept the large retaining fees paid to them by Hancock in 1853–4, as shown by this record, if they knew that in 1848 the grant had been forfeited. Paschal had been attorney in the Peters' Colony case, and hence the mistake or device of the appellant to confound the facts and establish by parol proof that Mercer had been represented in 1848 by counsel in Navarro, when the decree for forfeiture was entered.

It is clear that the record shows no authority in Albert C. Horton to institute the suit, and such an omission is fatal. (Williamson vs. Berry, 8 Howard, 531; 3 Leading Cases in Equity, 269. Galpin vs. Page, 18 Wallace, 351.)

It is also manifest that the Navarro District Court was not a court of competent jurisdiction to decree forfeiture. For reasons assigned in Airhart vs. Massieu, 8 Otto, 491, there can not be any jurisdiction in any court in Texas to decree the forfeiture of a grant. If, however, such jurisdiction should exist it must be necessarily under the constitution and ordinance of 1845, special and statutory, and not general, *and must appear in the record produced.* (Williamson vs. Berry, 8 Howard, 531.)

For these and other reasons it is maintained that the record from the Navarro District Court is a nullity. It was obtained in a remote and inaccessible village of squatters and colonists, some coming in lawfully and some unlawfully upon the lands of the Mercer Colony. The grant did not forbid the State from organizing counties for proper purposes and from public policy; so that the government had admitted power to survey lines and boundaries of the several counties. Accordingly the county of Navarro was organized by the Act of 25th April, 1846; Kauffman by the Act of 26th February, 1848; and Hill by the Act of 7th February, 1853, which counties were wholly within Mercer's grant. McLennan was organized by Act of February 27th, 1850; Limestone by Act of 11th February, 1846; Freestone by Act of 6th September, 1850; Anderson by Act of 24th March, 1846; Vanzandt by Act of 20th March, 1848; Rains by Act of —— after 1866; Hunt by Act of 11th April, 1846; Hopkins by Act of 25th March, 1846; Collin by Act of 3d April, 1846; Dallas by Act of 30th March, 1846; Ellis by Act of 20th December, 1849; Johnson by Act of 18th February, 1854; Hood by Act of ——, after 1866; Somerville by Act of ——, after 1866, and Rockwell by Act of ——, after 1866. (See Paschal's Digest, p. 158 to 192, for the boundaries of these counties and their dates of admission."

The counties organized between January 29, 1844, and January 29, 1849, the term before the Mercer grant expired, included the counties which were subsequently admitted, but the dates of the admission of which are not stated above. It is alleged by appellant and admitted by appellee that these counties are laid down on the maps of the land office on Presler's map, as stated by witnesses and constitute the Mercer Colony grant.

The most important of these counties were organized before the petition in the case of the Governor vs. C. F. Mercer was filed in the Navarro District Court on the 11th of October, 1846. (Record, p.

323.) The Navarro District Court had no jurisdiction of lands lying beyond its borders. No judgment or decree of that court within the local jurisdiction that it possessed could extend beyond the limits of the county of Navarro.

By force of article 4, section 10, of the Constitution, article 1405, Paschal's Digest, the district courts had original jurisdiction in behalf of the *State* to recover penalties, forfeitures, and escheats, but there was no method of procedure by which it could be done. (Airhart vs. Massieu, 8 Otto, 491, citing Hancock vs. McKinney, 7 Texas, 384; Swift vs. Herrera, 9 Texas, 263; Johnson vs. Smith, 21 Texas, 722; Luter vs. Mayfield, 26 Texas, 325.)

Consequently the Navarro court had no jurisdiction over the subject-matter.

But even if a method had been pursued, such as at common law by *scire facias* and "*office found*," the decree or judgment of forfeiture could have had no extra territorial operation. It could only have divested Mercer's title and possession as to the land lying within Navarro County, and not to lands lying in the other fifteen counties. The record shows that no writ of *habere facias possessionem*, nor writ of assistance, nor any other possessory writ authorizing the sheriff of Navarro County to put the State, or the Land Commissioner, or any other officer in possession of the lands of Mercer and his associates, was ever issued or executed. The judgment or decree, *proprio vigore*, could not divest Mercer of the possession, and if the State delayed too long the judgment would have become obsolete or dead, so that no possessory writ could issue. The record does not show that any possessory writ ever did issue. Without such writ executed whilst in full force by the sheriff of Navarro County within his own county, the possession of Mercer and his associates could not be ousted, and therefore still exists. Consequently, without such writ duly executed the appellant can not claim that the Mercer Colony lands have been reannexed to the public domain of Texas.

Under the authority of many cases the Mercer reservation is still in full force, and has never been opened by any statute of Texas, or any judgment or decree to general location from the Land Office.

It is fully established by the decisions of this court, that wherever public lands are reserved for a special purpose, that the land officers can never exercise any jurisdiction over it afterward until there is some special act, decree, or judgment restoring it to the class of public

lands. (See Wilcox vs. McConnell, 13 Peters, 498; Polk vs. Wendell, *infra*; Foster vs. Nelson, 5 Peters; Davis vs. Gray, 16 Wallace, 203.)

If the sovereign alienate land by grant, for a special purpose, as in the Mercer grant, the power of the land officers cease, and the reservation continues until it expires by lapse of time or judgment. (Polk vs. Wendell, 9 Cranch, 99; Sidney vs. Lessee of Miller, 6 Peters, 666; La Frambois vs. Brammel, 4 Howard; Stoddard vs. Chambers, 2 Howard, 284.)

For these reasons it is maintained that there is nothing in the record produced by the defendant in the circuit court to show that the lands of the Mercer Colony grant have ever been re-annexed to the public domain of Texas, or have been within the jurisdiction of himself as Land Commissioner, or of his predecessors in office, since January 29, 1844, when the grant was made.

The conditions annexed to the grant are all subsequent, and any breaches of those conditions, or failure to perform the covenant, could not *ipso facto* work a forfeiture of the estate of Mercer. It only left in the State a right of action which it could not transfer to a stranger, and which it could alone enforce by the mandate of a statute to its officers, or a previous demand, and by proper suit for the land. (See Ruch vs. Rock Island, 97 U. S. 693, 697, citing Webster vs. Cooper, 14 Howard, 488; Davis vs. Gray, 16 Wallace, 203; 1 Shep. Touch. 149; United States vs. Arredondo, 6 Peters, 691; United States vs. Fremont, 17 Howard, and numerous authorities.)

The theory of complainant's case is founded upon the proposition that the emigration acts of the Republic of Texas, carried into effect by the grant to Mercer, and the colony contract created an original express trust, by which the Republic of Texas agreed to hold the Mercer reservation for the use and benefit of Mercer, if he performed the conditions annexed to the grant. Accordingly, it was agreed that the Republic "*should hold the lands for the benefit of the party of the second part* (Mercer) *aforesaid and this Republic.*" These words create an express trust, and it was so held by both Judges Woods and Pardee, after full consideration.

It is a fundamental principle in equity that a trust once created shall never fail on account of the refusal of the trustee to act. Courts of equity will in all cases follow the property or trust-funds into the hands of the holder unless he be a purchaser for a valuable consideration *without notice*, actual or constructive, and will treat such holder as a trustee. (1 Story's Equity, sec. 976.)

If the Republic of Texas, after having induced Mercer and his associates to embark their capital, labor, time, and efforts in establishing the Mercer Colony had confiscated his property, it would have been a good cause for reclamation through the political department of the United States and reprisals, or war if necessary, to protect them from injustice and perfidy. The United States could not have relinquished or abandoned those claims with honor, because the duties of allegiance and protection are reciprocal, and Mercer and his associates were entitled to protection.

One of the chief grounds of the discontents of Austin and the American colonists who colonized Texas under inducements held out by Mexico for its colonization by the act of 1825, and which was violated in 1830, by a subsequent decree of the Republic of Mexico, by which all Americans were forbidden from acquiring lands after that time. This legislation led to the Texas revolution. But how much more flagrant would have been the injustice if Mexico had not merely forbidden future emigration, but had divested the titles of colonists already settled and had authorized its public officers to enter upon, seize, and confiscate their lands. Such faithless conduct would have been a violation of natural right and international law. If Texas had dared to assert such a claim to revoke American grants before annexation it is morally certain she would never have been admitted into the Union. But this she did not pretend to do. On the contrary, Texas unanimously accepted the *express trust* proposed by the people of the United States. Can she *now* violate her promises, waste the trust-estates, or revoke the grants? (Perry on Trusts, sec. 41; Burgess vs. Wheate, 1 Eden, 255.)

When a trust is thus created the State must act through its agents or officers to execute the trust, as in regard to the bequest of James Smithson to the United States *in trust* for the establishment of the Smithsonian Institution, or upon the principles declared in the case of McDonough's executors vs. Murdock, 15 Howard, 367.

So, too, if the trust confided to the State of California as to holding the Yosemite Valley as a public park were violated by any waste, abuses, or misapplication of the trust-property, this court would have ample power and jurisdiction to prevent such wrongs and compel the execution of the trust.

When there are equities existing between a sovereign and subjects, courts of equity have jurisdiction and will adjust, declare, and decree those equities. (2 Spence's Equitable Jurisdiction, 33; Penn vs.

Lord Baltimore, 1 Vesey, 453; Burgess vs. Wheate, 1 Eden, 229; Davis vs. Gray, 16 Wallace, 203; Martin vs. Waddell, 16 Peters, 367.)

The emigration acts and the contract with Mercer created an *express trust* within the definition of writers of authority declaring that trusts created by instruments of writing that point out directly and expressly the property, persons, and purposes of the trust are *express trusts.* (Perry on Trusts, sec. 24.)

Against the enforcement of such trusts no lapse of time will prevail and the statute of limitations has no application. (Perry on Trusts, sec. 863; Kane vs. Bloodgood, 7 Johnson's Chancery, 90; Tinnen vs. McCane, 10 Texas, 248; Prevost vs. Gratz, 6 Wheaton, 481.)

The last report of Mercer to the Secretary of State was dated February 1, 1847, and is filed as exhibit "H" with the original bill. (Record, p. 87.) It is dated New Orleans, La., and shows that Mercer had no knowledge that a suit to forfeit his grant had been instituted in Navarro County. He had been zealously engaged in the most efficient efforts to settle the colony.

The witness Garnett testifies that he is a civil engineer and that Charles Fenton Mercer was his uncle. He had full knowledge of the Mercer Colony enterprise, but was in no way connected with it. He was an intimate friend and relation of Mercer, who was lying ill at the Verandah Hotel in the city of New Orleans, in March and April, 1847, which incapacitated him from going in person to the colony lands. Garnett, in his behalf, visited the colony. The correspondence between Garnett and Mercer was destroyed during the war. Witness knew that Mercer had paid out large sums of money for surveying the colony lands. Witness was in the colony in March, 1847. Nick Anderson, one of Mercer's agents, and a surveyor, informed him of the obstructions to the survey; and so did Dr. Rowlett and P. J. Pillans. A copy of the map marked exhibit "B" was sent to him in 1845, and he retained it ever since. Mercer had introduced and settled many colonists whom witness saw in March, 1847, on the colony lands. Witness "saw many of the colonists and obtained from the agents, Nick Anderson and Dr. Rowlett, lists of the colonists showing a number of families *largely in excess of the number required by the term of the contract up to that time.*" (Record, p. 184.)

The report of Mercer was admitted to record and ought to have been known to Attorney General Harris and District Attorney Johnson, as well as to Josiah F. Crosby, district-attorney, when the pretended judgment was rendered. Mr. Harris, the attorney general, is living, but his testimony, no doubt for good reasons, was not taken. Mr. Crosby was district attorney in 1848, having led a wandering life. He managed the suit with the assistance of the Hon. Richard Scurry and General Tarrant who represented certain "*locative interests*" within the bounds of the Mercer Colony. Witness believed that said suit was formally and properly brought, and his remembrance is that such papers as were filed in the cause were signed by Wm. G. Hale, as attorney for the defendants. Hale was not present, and is now dead. After stating many inadmissible and hearsay recollections he testifies that the result of the suit was a verdict in favor of the State, and a decree for the forfeiture of said contract.

Under the law of Texas, in a judgment by default, or *ex parte*, a statement of fact must preserve the testimony so as to show that the judgment has a sufficient foundation, or it is void. No such statement of fact appears in the proceedings. Consequently to supply this fatal defect Mr. Crosby's testimony is taken to help the record. Witness does not depose that any such statement of fact ever did accompany the record, but says he was "under the *impression* that *care was taken* to preserve the testimony adduced on said trial by writing the same down and having it signed by several witnesses and attested by the clerk of the court," etc. (Record, pages 306–7.)

When examined on cross interrogatories the witness deposed that he was not twenty-one years old on the 28th September, 1848. He did not see Hale at the Navarro District Court, and is not sure as to Paschal. To the fourth interrogatory he answered that he did not "*remember that any attorney took any active part in the defense.*"

From this worthless testimony it is very evident that Mr. Crosby was a young man of nineteen and had no conception of what was the proper and legal proceeding for forfeiting and revoking a grant; that he surrendered the whole case to the Hon. Richard Scurry and General Tarrant, who represented the locative interests; that is, to the lawyers of the squatters and lawless men who were seizing and locating the Mercer lands.

We have thus seen that Mercer had fully performed his contract when the so-called Navarro record was filed in the Land Office, Decem-

ber 11, 1848. The record of forfeiture is, for many reasons (some of which have been mentioned), a nullity, and can not be helped by the testimony of Mr. Crosby or the rumors of the old settlers based upon the supposed validity of the proceedings in Navarro County.

The record shows (page 323) that the petition in the suit of the Governor vs. Mercer, *et al.*, was filed October 11, 1846; the district attorney, Johnson, made the affidavit to obtain publication March 25, 1847; the citation issued July 12, 1847, when the order was made to publish the summons in the *Northern Standard* eight successive weeks.

The record contains no sheriff's return or evidence of any such publication. The trial took place September 25, 1848. The certificate of the clerk, J. M. Riggs, is that the copy offered in evidence was a correct copy of the petition, amended petition, and all orders and judgments, and is dated *September* 12, 1854.

Attention is called to the fact that in pleading the estoppel by his answer (record, p. 68) defendant alleges "that a certified copy made *December* 11, 1848, of the proceedings in said court in said cause of the said judgment and decree shortly after its rendition by the said District Court of Navarro County was deposited in the General Land Office of the State of Texas, and that the same has remained on deposit in that office to the present time and is now on deposit there."

There is a variance therefore between the allegation pleading the estoppel of *res adjudicata* and the record, in this—that the record is certified on the 12*th September*, 1854, instead of on the 11*th December*, 1848, as alleged. Such are the statements in the printed transcript, which would make a fatal variance, though possibly it may be an error of the printer. But even if the allegation be true there never was any evidence in the Land Office to abolish the reservation and annex the lands to the public domain until December 11, 1848, or about six weeks before the expiration of the Mercer Colony reservation, and consequently no right or authority existed in any officer before that time to deny the trust.

It is therefore contended that the defendant is, and all his predecessors were, precluded and estopped from denying the validity of Mercer's grant, or the trust; or the facts of performance reported by him and accepted by the State; or his right to possession within the colony limits. If that right ever existed, which is denied, it was subsequent to the 11th December, 1848, or 12th September, 1854, as

the fact may be, and can not retrospectively operate on the lands acquired by Mercer before that time.

In the year 1848, General Mercer it is believed made another report showing further performance of his contract, but the loss of his private papers is proved by the witness Garnett, and the neglect perhaps of the Department of State or refusal to register his reports, as well as the burning of the archives in a conflagration which destroyed the the capitol, has left appellee without any later proof of performance by record than that furnished by the report dated February 1, 1847.

This proof, however, is fully supplied by the authentic report of John M. Crockett, page 116 of the record, which was produced and read in evidence by complainant in the circuit court. Crockett was appointed Commissioner for the State of Texas for Mercer's Colony under an Act approved February 2, 1850; Texas Acts, vol. 12, page 120; Hartley's Digest, sec. 2309; Paschal's Digest, page 245, sec. 886, art. 891, 892. (See Appendix No. —.)

By the first section of this act the legislature, as appellant alleges, severed the colony contracts made between Mercer and the colonists authorized by his original colony contract. The legislature of Texas declared that the colonists under Mercer were entitled to 640 acres for each family and 320 acres for each single man over the age of seventeen years. Appellant also cites and relies upon this first section as a denial of the trusts and a forfeiture of the Mercer Colony contract. To do this he attempts to torture the section so as to make it mean precisely the opposite of its fair and lawful intent. The following is the section.

Art. 2309 [1]. Be it enacted by the Legislature of the State of Texas, That every colonist, or the heirs or administrators of such colonists, citizens of the Colony of Charles Fenton Mercer and his associates, on the 25*th of October*, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit: Six hundred and forty acres to each family, and three hundred and twenty acres to each single man over the age of seventeen years. *Provided*, That nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed. (Hartley, 702.)

By force of the proviso it will be seen that the Legislature did not attempt to claim a forfeiture, but recognized the rights of Mercer and

the Texas Association and expressly declared that nothing contained in the act should be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.

This supports complainant's allegations by showing that the vexed question of the colony contracts which were not settled in 1850 were only postponed by the Legislature and it was not its intention to forfeit those rights. Neither this section nor any other in the Act contains a word of forfeiture, nor does it authorize any officer to claim a forfeiture of the Mercer Colony grant. The Legislature ordered the questions to remain in *statu quo* between the State and the colony contractors.

By the second section of the act the Governor was authorized to "appoint a Commissioner whose duty it shall be to hear proof and determine what *colonists* shall be entitled to land as aforesaid," and to issue certificates accordingly. The certificates by the third and fourth sections could be assigned or located within the limits of said Colony.

Particular attention is called to the fifth section of the act. (Art. 2,313, Hartley's Digest, page 703.) It is as follows:

"That no change shall be made in the boundaries of the surveys of settlers whether they be [made] with or without the consent of the contractors so that the boundaries thereof are justly and definitely marked."

By this section it will be seen that the Commissioner had no power to change the boundaries of surveys made by Mercer for the settlers under their contracts. It shows too that Mercer had settled every family within boundaries prescribed by him, and within the surveys of these boundaries; and thus establishes the introduction and settlement of the 1,256 families by Mercer.

The eighth section of the act is as follows: Art. 2,316 [8]. That to entitle the colonists to the benefits of this act, they shall be required to prove by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony, prior to the 25*th of October*, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither; *Provided*, That they shall not be required to prove that they have cultivated land. (Hartley, 703.)

It is obvious by this section that none of the inhabitants of Texas, except the *Colonists* who entered under Mercer, are within the purview of the statute, nor entitled to its benefits. Again, the Commissioner is not authorized to recognize any claim unless it was supported by the oaths of two respectable witnesses, that the claimant emigrated to Texas, and became a citizen of Mercer's Colony *prior to the 25th of October*, 1848. What is the meaning of this date?

At the trial the file-mark showed the 25th of October, 1848, was the day on which the so-called record from Navarro County was deposited in the Land Office.

This explains the reason why the Legislature fixed that day to ascertain how many colonists Mercer had introduced, because by the terms of the contract no forfeiture could operate by relation, or work retrospectively.

Again, the act demonstrates that the Legislature did not intend to forfeit the Mercer contract, but resolved to leave it in *statu quo* as heretofore stated, so that it might await the event of the decisions of the court in regard to the Peters' Colony case, and other colony contracts which were then in litigation, because the same principles of law and equity applied to all the colony grants. This same section also required the Mercer colonists to prove that they had performed all the duties required of them as citizens by the emigration laws. These duties were in relation to cultivation of land, building cabins, residing on the land for three years, and other conditions subsequent, which were required in the emigration statutes, and were stipulated in the sub-contracts with Mercer.

The Commissioner would have been entirely faithless to his duty unless he had required such proof, and accordingly it was made by each of the 1,256 Mercer colonists, to whom certificates were issued, as shown in the list made by J. M. Crockett, Commissioner, in his report (record 116 to 142 inclusive).

Under these authorities the evidence shows that the title having vested in Mercer by force of the grant and his estate in possession by his actual entry, that it became indefeasible to that extent after May 1, 1845, as to one hundred and nineteen families. So, also, by introducing 1256 families prior to October 25, 1848, when the record from the Navarro Circuit Court was first deposited in the Texas Land Office, Mercer's title had become absolute within the colony limits

as to 1256 sections and to 120 premium sections of land as stipulated, as well as to a pre-emption of all the other sections of the four millions of acres within the colony boundaries.

John M. Crockett was appointed Commissioner under this act of 1850. He is a witness for appellant, and deposes that he came to Texas in the fall of 1847 and knew the section of country, known as Mercer's Colony. He was appointed Commissioner to execute the act of 1850 by the Governor. The purpose with which Crockett visited the settlements in 1850–51 was to examine into the claims as required by the statutes and to issue certificates to the Mercer colonists. The Commissioner refers to his report for the execution of his official duties under the statute. This report contains the names of the 1,256 colonists with the number of the certificates issued to each, and is also accompanied by the certificate of John M. Crockett, Commissioner of Mercer's Colony, who states that under his official oath the report contained a full, complete, and correct list of the certificates issued by him to the settlers of said colony. (Record, 116, 142.)

The Mercer colonist's before they could get their land under the eighth section of the act of 1850, were required to swear that they had never received any land from the government of Texas outside of the Mercer Colony in consideration of their emigration to the State.

From this it will be seen that the State simply confiscated Mercer's land.

Crockett could not issue a certificate to any colonist who did not relinquish his claim to the section of land to which he was entitled under the laws outside of the Mercer Colony limit, in consideration of his being a settler and inhabitant.

By this contrivance the State saved 1,256 sections of her public domain outside of the Mercer grant by seizing the rich lands of Mercer which were augmenting in value with great rapidity. By such means the colonist was seduced from that fidelity which was due to Mercer who placed him in possession; and was tempted to betray his benefactor by renouncing his claim to less valuable lands in the more remote and less fertile parts of the State.

The attempt of the legislature was not to defraud Mercer absolutely out of all compensation, but to push him westward on less valuable lands as they subsequently did the Peters' Colony. Such is the true meaning and intent of the act of February 2, 1850, volume 12, page 12; Hartley's digest, page 701–2–3 and 4.

It is claimed by appellee that by force of this act the full performance by Mercer of his contract is shown.

Mercer was only compelled to settle five hundred families in five years to render his title indefeasible. He is shown to have settled 1256 families before the *25th day of October, 1848*, or three months before the five years of his colony term expired.

Judge Pardee, after great consideration, examined into this important fact, and the evidences as to the settlement of these 1256 families prior to the expiration of the term mentioned in the contract. He scrutinized the act of February, 1850, and held that under that act Crockett could only issue certificates to such colonists as proved by their own oaths, supported by the oaths of two respectable witnesses, that they each and all emigrated to Texas and became citizens of the Mercer Colony prior to *October 25, 1848*. The court further found that Crockett's own sworn report showed that 1256 families had made such proof to his satisfaction; and held that all the lands within the Mercer Colony were set apart to be colonized under the contract, and that the depositions of Pillans and others proved that there were very few, if any, locations in 1844 within the Mercer Colony limits. The court further held that the families to whom Crockett issued certificates were upon the colony lands and settlers, and that they could only be there lawfully under Mercer and the Texas Association. (Judge Pardee's opinion, pamphlet, pages 21, 22.)

Such is the overwhelming evidence produced in the record to show that Charles Fenton Mercer fully performed his contract.

There are many decisions in regard to such settlement grants in the courts of the several States. They all show great indulgence as to the performance of the usual conditions annexed to such grants. The judiciary recognized the difficulties experienced in planting colonies in remote and uninhabited countries, and sympathized with the struggles of the early pioneers and colony contractors. The courts do not tolerate the idea that any failure to perform the conditions annexed to a grant in precise terms rested upon the same principles that are established for the forfeiture of stock in stock-jobbing contracts for non-delivery at the hour. In the large Virginia grants, which had conditions annexed for settlement, the colonial legislature never forfeited them, as Judge Tucker remarks in his notes to Blackstone. So in the case of the United States vs. Arredondo, 6 Peters, 716, this

court rebuked Mr. Wirt and Mr. Taney, the Government counsel, for contending that the title of Arredondo was not a "*grant*," but a mere inchoate or equitable title, and therefore not within the words of the Florida treaty. This court, speaking through Mr. Justice Baldwin, declared that no such narrow or technical distinction in the interpretation of a treaty was compatible with the dignity or honor of the United States. Mr. Taney, afterward chief justice of this court, in the case of the United States vs. Fremont, 17 Howard, 532, reviewed the whole doctrine of such conditions, and refused to admit the point urged by the attorney general, Mr. Cushing, who contended that the Mariposa grant was void because the conditions annexed to it had not been performed.

Again, in Davis vs. Gray the distinction between conditions precedent and subsequent was fully considered. The court declared that conditions subsequent are not favored, and where they are sought to be enforced there must have been a re-entry, or something equivalent to it, or the suit must fail.

In Davis vs. Gray this principle was again announced that if a condition subsequent be possible at the time of making it, and it afterward becomes impossible to be complied with by the act of God or the law, or the act of the grantor, the estate having once vested can not thereby be divested, but becomes absolue and indefeasible. (Davis vs. Gray, 16 Wallace, 230; 4 Kent, 130; 2 Blackstone Com. 166; Tucker's Addition with Notes, 152; Ruch vs. Rock Island, 7 Otto, 696; Finlay vs. King, 3 Peters, 361, 362.)

Hancock purchased Mercer's interest in 1852. (Record 226; Deposition of Duvall, page 229; See also Birchett's deposition, page 197.) Hancock procured for Mercer an annuity of $2,000 per year. General Mercer visited Europe where he was amply and comfortably sustained on this annuity for three or four years, and until he returned in 1857, and died in May, 1858, at Alexandria. (See Garnett's deposition, 185–186.) Hancock continued to act as chief agent and trustee until the time of his death, on the 6th day of August, 1875, and for more than twenty-three years acted and was recognized as chief agent and trustee of the Texas Association until Wm. Preston was chosen chief agent and he is the present appellee.

An objection was made at the trial that the will of Hancock, which devises all his interest to Wm. Preston, in Texas, and devolves the trust upon him, was inadmissible in evidence, as shown in the

eighteenth exception (record, page 233), because it was never probated in the State of Texas. The point was argued and overruled for the reason assigned by Judge Pardee. The authority given in the will of Hancock is perfectly regular and formal. It appears in the printed record at pages 107 and 108, and by the eighth clause, and devolves the trust upon Wm. Preston in formal terms, under the powers contained in the fundamental articles of the Texas Association. By well settled principles this devise, duly authenticated, could have been produced in any action of ejectment or action of trespass to try title in Texas, to show the regular chain of title from Hancock to Preston.

It is therefore believed that Preston's right to maintain the suit is beyond controversy, as decided by Judge Pardee at pages 21 and 22 of the pamphlet opinion.

The record shows with how much zeal and energy George Hancock prosecuted the Mercer grant from 1852, the time he became chief agent, until the time of his death. See the depositions of James Craik, Thos. H. Taylor, Duvall, and J. S. Johnson, pages 205, 219, 224, 229; Letter of Hancock, dated January 28, 1854, page 239, with extracts from record-book of Texas Association. This evidence shows the persistent efforts of Hancock and the excuses and delays made by the Government for deferring his claim. It is fully shown that the Texas Association claimed a fair and just settlement of their interest upon the same basis applied by the state of Texas to the Peters' Colony. The Peters' Colony controversy was decided on the 10th of February, 1852, and by the terms of compromise the suit involving the colony questions was dismissed. The state ended the litigation by issuing certificates for 1,700 square miles of land to the contractors of the Peters' Colony. (See Paschal's Digest, page 239.)

It was at this time that General Mercer sold out and assigned his interest to Hancock, who stands in the record as a bona fide purchaser, for a valuable consideration.

Claudius Duvall, the secretary of the association, testifies that he paid $375 cash for two shares of stock at this time, and having become secretary of the association continued in office until the death of Hancock, in 1875. The secretary deposes that the assignment made by Charles F. Mercer, original grantor, to George Hancock was made on 27th of February, 1852, or seventeen days after the final settlement with the Peters Colony by the State officers. The testimony of

the secretary and others shows the great expectations of the stockholders that the same principles of settlement would be applied to the Mercer Colony grant that had been adopted by the State of Texas as to the Peters Colony. This, also, is shown by the memoranda and correspondence of G. W. Paschal (record 257, 268) and Thos. H. Duvall—but adjustment was delayed until the case of Melton vs. Cobb (21 Texas, 539) could be decided as set forth in the original and amended bill. These allegations are not denied by the appellant and are therefore admitted of record. Melton vs. Cobb was decided in 1858. Hancock endeavored through his counsel, in 1858 and 1860, for two years to obtain a settlement, but in vain.

The civil war commenced and Hancock having adhered to the Union could obtain no redress. All business intercourse between Texas and the United States ceased, and afterward martial law prevailed in that State until March 20, 1866. (12 Wallace, 702; 9 Wallace, 70.) There was almost an anarchical condition of government in Texas for some years afterward. The military governments afterward ceased. (9 Otto, 190; 21 Wallace, 87; 1 Otto, 714; 22 Wallace, 295; 9 Wallace, 132; 32 Tex. 19; Ibid. 177; 7 Wallace, 730.) It was in view of these facts that Judge Woods held that the averments of the bill offered a reasonable excuse for the delay of Hancock to bring suit, and that by the law of the State of Texas the courts will not under such circumstances apply the statute of limitation. (McKinn vs. Williams, 48 Tex. 89.)

By well established principles of law the appellant has no right to impeach the Mercer grant collaterally in this suit. (Angell on Corporations, sec. 777; Livingstone vs. Thompson, 4 Johnson's Ch. 415.

He could not make any allegation to vacate or forfeit the grant, for the validity of a grant or patent can not be assailed collaterally even if it were obtained by fraud or false and perjured testimony, any more than a judgment of a court of justice can be assailed collaterally on like ground. (See Steel vs. Smelting & Refining Co., December 18, 1882, not yet officially published; Morrison's Transcript, vol. 5, No. 9, page 492.)

The appellant relied upon article 77, Hartley's Digest, under section 13 of the Act of May 11, 1846, defining the duties of the attorney-general of the State to show the authority of Attorney-General Harris to institute the suit in Navarro to forfeit the Mercer grant.

That section is as follows: "That it shall be the duty of the attorney-general of this State to file the petition or information, and institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate."

It is evident that this section did not warrant any mode of procedure by which Attorney-General Harris could file the bill in chancery in Navarro to annul the grant. It authorized him only to institute "*legal proceedings*" either by the common law or some new mode of procedure, which the legislature was required by the Constitution to provide.

The only *legal proceedings* under the common law were by *scire facias* and *office found.*

A proceeding for forfeiture under the common law must be by an information or a *scire facias*, which can only be allowed after office found. In treating of such inquests of office Chitty says in his Treatise on the Law of Prerogative (edition of 1820, p. 247):

"This inquiry is an office or presentment; an office which finds matter to entitle the King to some possession, for an office is a title for the King. This is an admirably constructed barrier between the crown and the subject; the object evidently is to support that fundamental principle of English law, that the King may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury." Rex vs. Butler, 3 Levinz; Gilbert's Exchequer, 152; 3 Blackstone's Com. 259; Nicols vs. Nicols, 2 Plowden, 485."

The necessity of office found to reannex land to the public domain in the United States is fully stated in the case of Lord Fairfax's grant of the northern neck of Virginia by Judge Story in Fairfax vs. Hunter, 7 Cranch, 603.

The return of the inquest by the jury *in pais* merely gave a right of action and does not divest either title or possession.

"For it is a general rule that in all cases where a common person can not enter, but is driven to his action, there the King can not have the possession but by a like action or else by a *scire facias* after office found." Chitty on Prerog. 252, chap. 12; Robinson vs. Huff, 3 Littell, 38; Barbour vs. Nelson, 1 Littell, 60; Sabriego vs. White, 30 Texas, 243; Jones vs. McMasters, 20 Howard, 8. In this last case

it was held that title could not be divested until after office found and a judgment of forfeiture.

Judge Woods having been appointed an associate justice of this court, a delay occurred, from the fact that the district judge, the Hon. Thomas P. Duval, had been counsel for George Hancock and could not sit in the cause. After full preparation the case came on for final hearing on the merits before Judge Pardee, the successor of Judge Woods, and was argued and submitted. On the 25th of January, 1882, Judge Pardee delivered an opinion declaring in effect that all the exceptions made by the defendant in the demurrers should be overruled; and that all the allegations of fact contained in the original bill of the complainant, and the bills of revivor and supplement, were found to be true and supported by the proof, and that the order and writ of injunction granted by Judge Woods in 1879, should be made perpetual. (Record, page 335.)

Judge Pardee concurred with Judge Woods in regard to all the issues of law made by the defendant. The principal contention was made in the demurrer filed by John J. Groos, in regard to jurisdiction as heretofore stated. (Record 10.) The first ground of demurrer is in these words: "1. That the complainant's said suit is in effect a suit against the State of Texas, and seeks to interfere with and deprive the said State of the right and power of disposing in its own way of its public lands."

For more than half a century the question of jurisdiction in all cases where vested rights have been invaded or threatened by State officers under color of authority, the courts of the United States have constantly interposed and energetically repressed such pretensions. In the great leading case of Osborne vs. Bank of the United States, 9 Wheaton, 738, it was held that making a State officer a party does not make the State a party, nor bring the suit within the prohibition of the eleventh amendment of the Constitution of the United States, interdicting citizens from bringing suits against the States of the Union. That court, speaking through Chief Justice Marshall, then held that a circuit court of the United States may enjoin a State officer from executing a State law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of citizens.

It was upon this ground that Judge Woods overruled the demurrer, citing the cases of Davis vs. Gray, 16 Wallace, 203; Dodge vs.

Wolsey, 18 Howard, 331; State Bank of Ohio vs. Knoop, 16 Howard, 369; Debolt vs. Ohio Life and Trust Co. 16 Howard, 432; Debolt vs. The Mechanics & Traders Bank, 18 Howard, 383; and the Jefferson Branch Bank vs. Skelly, 1 Black, 436.

By the local law of Texas suits like that of Hancock vs. Groos can be maintained by citizens of Texas against State officers to compel them to perform any official duties imposed by law. (See Ward vs. Townsend, 2 Texas, 581; Cohen vs. Smith, 3 *id.* 51; Commissioner General Land Office vs. Smith, 5 *id.* 471; McLelland vs. Shaw, 15 Texas, 319; Stewart vs. Crosby, 15 Texas, 547.) These cases were cited and reviewed by this court in Davis vs. Gray, 16 Wallace, 221, and it was held that when a State permitted herself to be sued that was conclusive upon the subject and gave to the courts of the United States concurrent jurisdiction. This decision rested upon the case of Curran vs. the State of Arkansas, 15 Howard, 304.

If any doubt could exist upon a point so plain it is dissipated in the case of the Railroad Co. vs. the State of Mississippi, 8 Otto, 140, and by the recent decision of this court in the case of the United States vs. Lee, commonly called the "Arlington case." In the opinion of Mr. Justice Gray, the allusions made to Davis vs. Gray, do not affect the principles regulating the jurisdiction of the courts of the United States, as announced in Osborne vs. The Bank of the United States, or the long chain of cases decided in this court since that time.

Upon this point it may be remarked that the defendant's demurrer is framed in the language of Mr. Justice Davis in his dissenting opinion in Davis vs. Gray, 16 Wallace, 233, instead of in the language of the court establishing a different rule, as shown at page 220 of the same volume. Judge Woods, in overruling the demurrer, decided the law according to the paramount authority of this court instead of the general language of the dissenting justice.

The right of citizens of Texas to compel State officers by writs of mandamus to execute official duties is established in the cases already cited as held in Gray vs. Davis, in which this court cites the case of Houston and the Great Northern Railroad Co. vs. Kuechler, Commissioner of the General Land Office of Texas, not then reported but since published in 36 Texas Reports. Such rights can consequently be enforced by the citizens of other States against delinquent or refractory officers of the State of Texas. (See also Whitman vs. The Governor, 5 Ohio State, 528.)

The second ground of demurrer was strongly presented in Dodge vs. Wolsey, 18 Howard, 331, by distinguished counsel, but was overruled by this court. Under the authority of that case, as well as of those just cited, it can not now be seriously contended that citizens are compelled to look to the political department of any State to remedy wrongs inflicted upon them by State officers, under color of State law, where they invade the right, impair the contracts, or confiscate the property of the people.

The third ground, that the complainant was not entitled to discovery, was overruled because Judge Woods held that the emigration acts of the Republic and the contract with Mercer sustained the allegation of complainant's bill as to the trust. That allegation is as follows:

"And your orator is advised that the Republic of Texas at the date of said contract was seized in sovereign demesne of all the land within the limits of the grant to Mercer, and, by the statutes inviting colonial contracts, held out to the world a solemn promise that in all colonial contracts an immediate vested estate, being an equitable estate, should pass to and vest in the contractor, subject, however, to be divested by the non-performance of the conditions annexed to the grant, within five years of the date of the contract. So that the government was left with only the legal estate in fee, and a reversion in fee after the lapse of five years, if the conditions annexed to the grant were not fulfilled; and that said statutes and contract together created and declared a trust whereby the State only retained a legal estate, and empowered and commanded the proper officers to convey said legal estate to the contractor and the colonists as soon as evidence was adduced of the introduction and settlement of the requisite number of families according to the contract; which vested rights, however, could only be lost or forfeited by non-performance of the conditions annexed to the grant, legally ascertained and lawfully declared, and that it was with such an understanding Charles F. Mercer accepted said contract, and in the full confidence and trust that it would be faithfully performed and specifically executed between him and the officers nominated in the contract to execute specifically the statutory powers conferred upon them; and which trusts the said donees of said statutory powers, raised and declared by the Republic as hereinbefore stated, the said officers now refuse to execute and perform, to the manifest wrong, injury, and oppression of your orator and the Texas Association."

The demurrer was therefore on the record of title in Mercer with possession and also on the *merits*, and *admitted this trust*, which was thus alleged and sustained by documentary evidence of record; so that within the principles established in Aurora vs. West, 7 Wallace, page 99, the Land Commissioner should be precluded by force of Judge Woods's order on the demurrer from again questioning the trust. That was a question of law properly raised by the demurrer and finally decided. Judge Pardee declared that the views of the law held by Judge Woods in the seven propositions of his opinion, of which this was one, were the settled law of this case. The authority of the case of Aurora vs. West, 7 Wallace, page 99, as to the conclusive effect of a demurrer was then pressed in argument and fully allowed by Judge Pardee. (See Judge Pardee's opinion, pages 15–16 of the pamphlet.)

It is deemed unnecessary to say more to maintain the proposition that the appellee was and is entitled to full discovery from the appellant of the waste of the trust-fund; the number of acres remaining in the colony grant; the patents wrongfully issued from the land-office by mistake; the money wrongfully received from the trust-property, and paid over by mistake to the Treasurer of the State of Texas; and the unpaid notes and obligations resulting therefrom and now wrongfully withheld by appellant; the names of the patentees and the boundaries of their patents; the exact boundaries of the Mercer reservation as laid down in the files, field-notes, and maps of the land-office, and all other material facts touching the administration, waste, and abuse of the trust. This duty, by force of the contract, was devolved upon the land-office without the payment of any fees by Mercer or his representatives after his reports were accepted and recorded. Moreover, it is easy for an officer honestly inclined with the clerical force at his command to make such discovery; but it would be costly, ruinous, and perhaps impossible for the appellee or the Texas Association to make such proof. Theodore Garnett, the nephew and sole devisee of Mercer, deposes that all of Mercer's papers were lost by him during the war. (See Garnett's deposition, page 169 of the Record.) The refusal of the Land Commissioner to render such a discovery after the court declared that a trust is established is unusual and contrary to equity, and a further violation of the honest duties incident to the trust.

The fourth ground of demurrer was that the demand was stale

and barred by lapse of time. Judge Woods decided that a trust was created whereby the State of Texas became a trustee for Mercer and his associates under the compact with the United States, and by force of which the State of Texas substantially guaranteed the government of the United States, as paramount sovereign, from any liability to Mercer and his associates, and agreed to execute with justice and good faith the trust assumed. Consequently Judge Woods held that it would not be competent for the State, if a party, to set up lapse of time or any defense analogous to the statute of limitations to protect her from being called on "*to execute the trust.*" For as between trustee and *cestui que trust* in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. (Judge Woods's opinion, record, pp. 347, 348; Perry on Trusts, sec. 41; New Orleans vs. The United States, 10 Peters, 662; United States vs. Arredondo, 6 Peters, 691; Pollard's heirs vs. Kibbe, 14 Peters, 353.) The appellee relies on these authorities to show that the fourth ground of demurrer of Groos was properly overruled. In this opinion Judge Pardee, in the first five propositions discussed by him, concurs and declares that neither lapse of time nor any defense analogous to the statute of limitations can be set up by the trustee of an express trust as a "defense to his liabilty to *execute the trust,*" and consequently the appellant is precluded from any such defense.

The appellee is therefore willing to rest the law of this case upon the opinion of Judge Woods as it appears at pages 338 to 349 of the printed record, which he adopts as part of this brief.

It is, therefore, maintained that the appeal should be dismissed and the judgment of the court perpetuating the injunction should be affirmed.

The Relief.

The only remaining point to be considered is in regard to the refusal of the court below to grant the affirmative relief prayed in the amended bill.

Both Judge Woods and Judge Pardee held that the case as made out imperatively required the intervention of a court of equity. The answers put in by the defendant, and the proof, showed that no adequate relief could be obtained within the boundaries of Mercer's Colony by certificates or patents for land. Judge Pardee decided that complainant was entitled to 1,376 square miles of land, and ex-

pressed an opinion that complainant is also entitled to 1,376 additional square miles upon payment of $12 coin and the value of $640 in old Texas scrip per square mile by way of pre-emption. The true measure of the relief to which complainant is entitled should embrace both of these rights.

Judge Pardee admits in his opinion that it would be but "just" to give complainant this relief, but he conceived it to be beyond the jurisdiction of the court to do so.

The reason assigned by the learned judge for denying this relief is that the State is not a party to this suit, and that this relief can not be given unless the State, as the holder of the legal title to the lands, is a party to the record.

The judge had just determined that the long chain of cases from Osborn vs. U. S. Bank, 9 Wheaton, to Davis vs. Gray, 16 Wallace, 203, authorized the jurisdiction, and relief is always commensurate with jurisdiction and the equity developed.

The counsel for the State have often been in the habit, in such cases, of proposing a dilemma. They say if you make the State a party the court has no jurisdiction, but if you do not make the State a party you lack a necessary party to obtain relief.

But this difficulty is only a theoretical, and is not a practical one. For, in all those cases the court proceeded to grant practical relief; restraining or compelling the *officers* of the State as justice required.

In the case of the United States vs. Schurz, 12 Otto, 402, the compulsory jurisdiction of this court was asserted against an officer of greater dignity than the Land Commissioner by mandamus, and full relief was given. So, by the State decisions of Texas in the cases cited *supra*, such ministerial acts may be enforced. By the concurrent jurisdiction of the courts of the United States equal powers are vested in the Federal courts to award similar relief.

In Davis vs. Gray, 16 Wallace, the Land Commissioner of Texas endeavored to baffle justice, in the same way that he is trying to do in this case; by claiming that the State was a necessary party. But this court granted affirmative relief by compelling the Land Commissioner to issue certificates and patents, and the Governor to join in them; so that the relief granted was as complete as it could have been if the State had been a party to the record.

It is true that the affirmative relief was granted in that case under a *mandamus*, but this court has said, in Board of Liquidation vs. Mc-

Comb, 2 Otto, that a court of equity will grant affirmative relief by a mandatory injunction, as "the correlative of a mandamus."

With due deference to the learned judge who denied the relief, it is manifest that the usual rules applicable to parties which he quotes from the text-book on specific performance, have no application here. The doctrine of equity as to specific performance is so different from the doctrine as to executing and enforcing trusts, that it is submitted that the judge erred in holding that this bill is in the nature of a bill to enforce specific performance. The whole theory of the case is that an express trust was created. The bill, therefore, is *to execute a trust.*

Those rules relate to contentions between citizens; but the cases of Davis vs. Gray, Osborne vs. United States, etc., show that there is an exception to the general rule in cases where a State can not be made a party to the record. In such cases the court will grant the relief without requiring the State to be made a party. But for this a State might order its officers to seize the property of a citizen and the citizen could not recover it from the officer because the State could not be made a party.

To say that you can not obtain relief without making the State a party, and then to say that if you make it a party you will thereby oust the jurisdiction of the court, is to reason in a circle.

Such is not the rule laid down in Davis vs Gray, but it states the law thus (16 Wallace, 220):

"1. A circuit court of the United States in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a Statute of the United States, when such execution will violate the rights of the complainant.

2. Where the State is concerned the State should be made a party, *if it could be done.* That it can not be done is a sufficient reason for the omission to do it, and the court may *proceed to decree against the officers of the State in all respects as if the State were a party to the record.*"

It is, therefore, with deference submitted that the relief asked in the amended bill, and on the appeal of Wm. Preston vs. W. C. Walsh, is in accordance with the principles laid down by this court in Davis vs. Gray, 16 Wallace, 203; Dodge vs. Wolsey, 18 Howard, 331; and Board of Liquidation vs. McComb, 2 Otto, 531.

In the great case of Penn vs. Lord Baltimore Lord Hardwicke said that it involved a controversy of as great dignity as any ever

determined under the imperial power of the Roman tribunals. The jurisdiction was assumed in that case, but that great and wise judge held that it was necessary to extend the powers of the High Courts of Chancery so as to settle intercolonial disputes in America. He did not shrink from his duty. When the American colonies severed their relations with England they recognized the authority of this celebrated case. In the preamble of the Constitution the people of the United States declare its chief purposes were to form a more perfect union, *establish justice*, and insure domestic tranquility. For this purpose they granted wider powers to our judiciary than any English court ever possessed. Under the decisions of this court any question involving the vested rights of the people against the aggressions of the States or their officers can be heard and determined. The principles announced by Lord Hardwicke have been adopted and enforced in many cases. In adjusting questions between the States and the citizens of the several States and in inter-state controversies this jurisdiction has expanded, as shown in a great chain of cases cited in this argument, so as to meet the growing wants and secure the property of a free, wealthy, and prosperous people. Not only the life, the liberty, and property of the citizen has been protected from State aggression, whether in their statute law or local constitutions, but even their free vocation to practice law or preach the gospel though interdicted by the organic law of a State or an act of Congress.

Trusting, therefore, in these decisions, it is firmly believed that this case will be determined between the officer of a sovereign State and its representative, and a private association, organized under its laws in the light of those sacred principles of equity which the appellees have invoked.

In speaking of the liberty of the English people Lord Chatham once said: "The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail, its roof may shake, the wind may blow through it, the storms may enter, the rain may enter, but the King of England can not enter. All his forces dare not cross the threshold of the ruined tenement."

The history of this court for nearly a century attests that the property of an English subject is not more secure than the rights of an American citizen; and that the pre-emption of the pioneer is as inviolable as the freehold of the Englishman. In the hope that the last Colony grant of a great State may stand under the judgment of this court as a land-mark of the sanctity of titles, this cause is submitted.

Respectfully submitted,

WM. PRESTON.

Supreme Court of the United States.

MARCH 1883.

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellee.

No 864.

Errors Assigned by Appellant.

The circuit court declined to give relief to the extent prayed by complainant:

1. It refused to grant a mandatory injunction inhibiting the Land Commissioner's further refusal to issue certificates and patents for the ascertained quantity of land (1,376 sections), under the contract, within the colonial boundaries, or its equivalent in value elsewhere.

2. It refused a similar mandatory injunction inhibiting his refusal to issue certificates and patents on tender of the contract price, for the alternate 1,376 sections within the colonial boundaries, or its equivalent in value elsewhere.

3. It refused to grant a mandatory injunction, the effect of which would be to permit the location of complainant's patents and certificates on any vacant and unoccupied lands of Texas, within or without the limits of Mercer Colony.

4. It refused to recognize complainant's claim as a trust fastened upon the entire public domain and enforceable in equity as against the unappropriated lands.

WILLIAM PRESTON,
JOHN MASON BROWN,
Counsel.

APPENDIX,

CONTAINING STATUTES OF TEXAS AND DOCUMENTS REFERRED TO IN THE BRIEFS OF MR. PRESTON, MR. BROWN, AND MR. DAVIE, OF COUNSEL FOR APPELLEE.

No. 1.

ACT OF JANUARY (FEBRUARY) 4, 1841.

Hartley, p. 624.

An Act granting Land to Emigrants.

Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That every head of a family who has emigrated to this Republic, since the first of January, one thousand eight hundred and forty, or who may emigrate before the first of January, one thousand eight hundred and forty-two, with his family, and who is a free white person, shall be entitled to six hundred and forty acres of land; provided he settle and actually reside on the same for the term of three years, and cultivate an amount of the same, not less than ten acres; and further provided, he shall have his land surveyed and plainly marked, so as to include his improvements.

Sec. 2. Be it further enacted, That each single man over the age of seventeen, who has or may emigrate as provided in the first section of this act, shall be entitled to three hundred and twenty acres of land upon the same conditions and restrictions as the heads of families.

Sec. 3. Be it further enacted, That in no instance shall a patent be issued under the provisions of this act, unless the party produce the official certificate of the Chief Justice of the county where he may reside, that he, the said applicant, has proven by two respectable and creditable witnesses that he has resided on the land for which he wishes to receive a patent, and that he has cultivated the quantum of land

required by this act for the term of three years, and that he has done and performed all the duties required of other citizens, and that he has taken the oath of allegiance to this Republic; provided, always, the applicant shall be required to make oath or affirmation, that he has complied with the requisitions of this act, which oath or affirmation shall be properly authenticated.

Sec. 4. Be it further enacted, That the President of the Republic be, and he is hereby authorized, to make a contract with W. S. Peters, Daniel S. Carroll, Alexander M'Red, Rowland Gibson, Robert Espie, Wm. H. Oldmixon, Daniel Spillman, Robert Hume, John Salmon, W. Byrne, Henry Richards, Robert D. Stringer, W. C. Peters, John C. Banseman, John Peters, Wm. Scott, Phineas J Johnson, H. S. Peters, Timothy Cray, and Samuel Browning, collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the Republic, on the following conditions, to wit: the said contractors, on their part, agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract; provided, however, they shall commence the settlement within one year from the date of said contract.

Sec. 5. Be it further enacted, That the said contract shall be drawn up by the Secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution, which contract shall be signed by the President and the party or parties, and attested by the Secretary of State, who will also preserve a copy in his department.

Sec. 6. Be it further enacted, That the President shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside; provided, however, that all legal grants and surveys that may have been located within the boundaries so designated previously to the date of said contract, shall be respected, and any locations or surveys made by the contractors or their emigrants on such grants and surveys shall be null and void.

Sec. 7. Be it further enacted, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family, comprehended in said contract, nor more than three hundred and twenty acres to a single man over the age of seventeen years.

Sec. 8. Be it further enacted, That no individual contract made

between any contractor and the families or single persons which he may introduce for a portion of the land to which, respectively, they may be entitled by way of recompense for passage, expense of transportation, removal, or otherwise, shall be binding if such contract embrace more than one half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land, nor shall any emigrant be entitled to any land, or receive a title for such land until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation and under good fence at least fifteen acres on the tract which he may have received.

Sec. 9. Be it further enacted, That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them; provided, however, that this provision shall not release the colonists from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done without a sale of their land; and, further, the President may donate to every settlement of one hundred families, made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

Sec. 10. Be it further enacted, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families, and in the same ratio of half sections for every hundred single men introduced and settled, it being understood that no fractional number, less than one hundred, will be allowed any premium.

Sec. 11. Be it further enacted, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; and further, all fees incidental to the issue of patents for lands acquired under the provisions of this law, shall be paid to the Commissioner of the General Land Office for the use and benefit of the public treasury.

Sec. 12. Be it further enacted, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce, who shall be entitled to their respective quotas of land, agreeably to the provisions of this law.

Sec. 13. Be it further enacted, That the contractors shall be required to have one third of the whole number of the families and single persons for which they contract, within the limits of the Republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same, and it shall be the duty of the Secretary of State forthwith after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture, unless the President, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them for the number of families which they are bound to introduce; and this act shall take effect from and after its passage.

No. 2.

SUPPLEMENTARY ACT OF FEBRUARY 5, 1842.

Hartley, p. 645.

An Act amendatory of "An Act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one.

Article 2087. [1]. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the provisions of an act entitled "An act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one, so far as relates to the authority thereby given to the President to enter into a contract with W. S. Peters and others to introduce colonists upon certain terms therein expressed and set forth, be and the same are hereby extended to such other company, or companies, which may be organized for like purposes, as the President may in his judgment approve.

Art. 2088. [2]. Be it further enacted, That all the rights accruing to said company by the provisions of said act, and all the duties, obligations, and conditions imposed by the same upon the said W. S. Peters and his associates, be and the same are hereby extended to such other companies as may be organized under the provisions of this act.

No. 3.

ACT OF JANUARY 16, 1843.

Hartley, p. 649.

Joint Resolution to modify the provisions of an Act entitled "An Act granting Land to Emigrants.

Article 2103. Whereas, by an act passed by the Congress of Texas, entitled, "An act granting land to emigrants," and bearing date the fourth day of February, 1841, a grant was made to Daniel Joseph Carroll, Henry J. Peters, and others, their associates, therein named, for the introduction and settlement of emigrants within the territory of this Republic, and upon the terms and conditions therein provided; and whereas, by said act, the President of this Republic was authorized to make a contract with said Daniel J. Carroll, Henry J. Peters, and their associates aforesaid, collectively, in conformity with the provisions of the same; and whereas, in pursuance of such authority, the President did make a contract with the aforesaid grantees, which was duly executed in their behalf, by their attorney, Samuel Browning, and which bears date the thirtieth day of August, 1841; and whereas, the President did make a further contract with the same parties, which bears date the twentieth day of November, 1841; and whereas, the President did make a yet further contract with the same parties, through their attorney, Horace Burnham, which bears date the twenty-sixth day of July, 1842, said last two contracts being supplementary to and making one with the said first contract; and whereas, it is deemed expedient to modify some of the provisions of said act and contracts, and to extend some of the privileges therein granted; now, therefore,

Resolved, by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the President be, and he is hereby authorized and required to make such modification of the aforesaid contracts, or such further contract or contracts, with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of this Republic, and as shall not be inconsistent with the provisions of the said act:

Provided, however, That he shall have full power and authority to extend the time to the grantees named in the aforesaid act, or to

their assigns or legal representatives, for the introduction and settlement of emigrants in this Republic, to a period not exceeding five years from the first day of July next; and that he shall be authorized to prescribe the limits within which the grantees or their assigns or legal representatives shall be permitted to introduce and settle any number of families, not exceeding ten thousand, within the whole time limited; that he shall be authorized to make the title and conveyance of each section of six hundred and forty acres of land which has been or shall be acquired under any contract made or to be made, by the President of this Republic, with the grantees or their assigns, or legal representatives, to the said grantees or their assigns, or legal representatives, direct: *Provided*, That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid; and shall be required to settle or receive such lots only as are of fair quality for agricultural purposes; and not too far situated in the interior of a prairie for such purposes, whenever they shall have completed the surveys of any number of sections, and built a corresponding number of small, comfortable houses, or cabins of logs or other materials, thereon, and placed families therein, they shall receive a title from this government to one section of six hundred and forty acres for each family so introduced and settled; and shall be required to immediately convey to the legal representative of said family, not less than one hundred and sixty, nor more than six hundred and forty acres of said land: conditioned that said family shall remain upon said land so conveyed, and enclose with fence and cultivate fifteen acres, for at least three years; and in default thereof, shall forfeit the same to this Republic.

Provided, further, That in the contract to be made by the President of this Republic with the said grantees, or with their assigns, or legal representatives, they shall be required to settle each year, within the territory prescribed, or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed; and in default of introducing and settling such number of families, their contract shall be forfeited.

Provided, however, That they shall be allowed to introduce and settle any number of families, not exceeding ten thousand in all, on the same terms and conditions; and,

Provided, further, That they shall be permitted to settle all the sections within any limits prescribed, or to be prescribed, and not located previous to the time of defining such limits; and that for every alternate section of six hundred and forty acres which shall be conveyed to them, they shall pay into the treasury of this Republic twelve dollars in specie, on receiving the title from the government; and,

Provided, further, That in case of forfeiture, the party shall only be affected prospectively, any thing in the aforesaid act, or contracts, to the contrary notwithstanding:

Provided, further, That the Cherokee lands shall be exempt from the provisions of this act.

No. 6.

ACT OF JANUARY 30, 1844.

Hartley, p. 652.

An Act to repeal all laws now in force authorizing the President to form Colonization Contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with.

Article 2110. [1] Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, that all laws now in force, authorizing the President to make contracts with individuals, or companies, for the purpose of colonizing and settling portions of the unappropriated lands of the Republic, be, and the same are hereby, repealed.

Art. 2111. [2] Be it further enacted, That all such contracts, already made, the conditions of which have not been strictly and rigidly complied with, or hereafter fail to be complied with, are hereby declared forfeited; and no extension of time or privilege shall be granted to said contractors for the purposes of carrying such contracts into effect.

Art. 2112. [3] Be it further enacted, That no further contract or contracts shall be made by the President with such individuals, who have already made contracts for the purposes above specified, whereby any further time, privileges, or facilities may be granted to said contractors; and the "Joint Resolution to modify the provisions of an act entitled 'An act granting land to emigrants,' approved January

16, 1843," so far as the same relates to any prospective action of the President, in regard to modifying said contracts, or extending the time as now embraced in said contracts, whereby the privileges of said company, or their assigns or representatives, mentioned in said joint resolution, may be increased, be, and the same is hereby, repealed.

Art. 2113. [4] Be it further enacted, That it shall be the duty of the Attorney-General, under the directions of the President, to ascertain as fully as possible, all the proceedings of said contractors, how far they have complied with their conditions, and in what respects they have failed, and report fully on said subject to the next Congress of the Republic, in order that they may take such further action thereon as they may think proper.

Art. 2114. [5] Be it further enacted, That it shall be the duty of the President, whenever he ascertains that any of the colonization contracts heretofore made, have been forfeited by a failure to comply with all their provisions, on the part of the contractors, to issue his proclamation to that effect, immediately.

No. 7.

JOINT RESOLUTION OF FEBRUARY 3, 1845.

Hartley, p. 660.

Joint Resolution to establish the limits of the Mercer Colony.

Article 2145. [1] Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land actually surveyed and marked by the first day of April next.

Art. 2146. [2] Be it further resolved, That a failure to comply with the provisions of the above section, shall work a forfeiture of their contract.

Art. 2147. [3] Be it further resolved, That no person shall be recognized as provided for in said contracts, who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of land as though they had been introduced as provided for in said contract; and that this act take effect from and after its passage.

No. 8.

JOINT RESOLUTION U. S. CONGRESS, MARCH 1, 1845.

Hartley, p. 44; 5 U. S. Stat. at Large, p. 797.

Joint Resolution for annexing Texas to the United States.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports, and harbours, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provis-

ion of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery or involuntary servitude (except for crime) shall be prohibited.

3. And be it further resolved, That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the government of Texas and the United States; and that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate or by articles to be submitted to the two houses of Congress, as the President may direct.

Approved March 1, 1845.

No. 9.

JOINT RESOLUTION OF CONGRESS OF REPUBLIC OF TEXAS, JUNE 23, 1845.

Hartley, p. 46.

Joint Resolution giving the consent of the existing Government to the annexation of Texas to the United States.

Whereas, The government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State,

to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the first and second sections of the resolution of the Congress of the United States, of March 1, 1845, *supra.*]

And, whereas, By said terms, the consent of the existing government of Texas is required; therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the preamble to this joint resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May 5, 1845, and the election of deputies to sit in convention at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the government of the United States, through their accredited minister near this government, with a copy of this joint resolution; also to furnish the convention to assemble at Austin, on the fourth of July next, a copy of the same. And the same shall take effect from and after its passage.

Approved June 23, 1845.

No. 10.

ACT OF JUNE 25, 1845.

Hartley, p. 662 Arts. 2151, 2152.

An Act requiring the Commissioner of the General Land Office to issue patents in certain cases.

Art. 2151. [1] That the Commissioner of the General Land Office be, and he is hereby, authorized and required to issue patents to all persons otherwise legally entitled to the same, notwithstanding the

lands for which said patents are or may hereafter be demanded may be within the limits designated in the colonization contract made on the twenty-ninth day of January, one thousand eight hundred and forty-four, between Sam Houston, then President of the Republic of Texas, acting in behalf of the Republic, and Charles Fenton Mercer and his associates, *provided*, the locations or surveys, in pursuance of which said patents are or may be demanded, were filed in the office of county surveyor, in which said lands may be, or made by his direction, previous to notice to said surveyor of the existence and territorial limits of said contract of colonization; *provided further*, that nothing herein contained shall be so construed as to declare that any certificate located within any colony limits, is not as valid as if located upon any of the vacant domain of the Republic.

Art. 2152. [2] The official certificate or certificates of said surveyor or surveyors, shall be sufficient evidence to the Commissioner of the General Land Office of the receipt of said information or notice by said surveyor or surveyors, in the first section of this act mentioned.

"AN ORDINANCE."

"Whereas, various contracts have been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas; and

"Whereas, it is believed that said contracts were unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upwards of seven millions of acres of the public domain of Texas, in the hands of a few individuals—when, in truth, the citizen soldiers and creditors of the Republic of Texas, had, by the laws and constitution of said Republic, a clear and indisputable previously subsisting right to locate upon the public domain thus attempted to be assigned to said contractors:

"Sec. 1. Therefore it is hereby ordained and declared, That it shall be the duty of the attorney general of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas; and if upon such

investigation, it shall be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void; provided, however, that all actual settlers under any such contract shall be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And in all suits brought by or against any contractors, or any person claiming under, by, or through them, or either of them, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead; and the party may introduce testimony to prove the claim or title to have been forfeited, as well for frauds, or illegality, or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas shall be deemed good and valid in law, in all such suit or suits in this State.

"Sec. 2. Be it further ordained, that the legislature is hereby restrained from extending any contract for settling a colony, and from relieving any contractor from the failure of the conditions, or the forfeiture accruing from non-compliance with the contract.

"Sec. 3. And be it further enacted, That this ordinance shall be presented to the people for their adoption or rejection, at the same time that this constitution shall be presented to them, and the returns of the votes taken on this ordinance shall be made to the office of the Secretary of State of the Republic of Texas, at the same time the votes for the constitution may be returned.

"Adopted in convention, this twenty-seventh day of August, one thousand eight hundred and forty-five.

"Attest: "THOS. J. RUSK, *President.*

"JAMES H. RAYMOND,

"*Secretary of the Convention.*"

No. 14.

ACT OF MAY 11, 1846.

Hartley, p. 104.

An Act defining the duties of the Attorney General of the State of Texas.

Art. 77. [13] *Be it further enacted*, That it shall be the duty of the Attorney General of this State to file the petition or information, and

institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate.

No. 15.

ACT OF FEBRUARY 2, 1850.

Hartley, p. 702.

An Act for the relief of the citizens of Mercer's Colony.

Art. 2309. [1] *Be it enacted by the Legislature of the State of Texas*, That every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the twenty-fifth of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit, six hundred and forty acres to each family, and three hundred and twenty acres to each single man over the age of seventeen years; *provided*, that nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.

Art. 2310. [2] That the Governor, by and with the advice and consent of the Senate, shall appoint a commissioner, whose duty it shall be to hear proof and determine what colonists shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such parties, certificates for their proper quantity of land.

Art. 2311. [3] That the owners of said certificates may locate, transfer, or donate the same, and exercise all rights of ownership over them.

Art. 2312. [4] That said certificates may be located on any vacant land within the limits of said colony not otherwise appropriated, as other headright certificates are located; and the same laws relative thereto shall govern the surveyors and other officers in the discharge of their official duties in relation to the surveying, recording, etc., of the same.

Art. 2313. [5] That no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent

of the contractors, so that the boundaries thereof are justly and definitely marked.

Art. 2314. [6] That should the commissioner appointed under the second section of this act fail or neglect to act, or should the office in any manner become vacant, the Governor is hereby authorized and required to fill such vacancy by appointing some competent person to perform the duties herein required as soon as practicable.

Art. 2315. [7] That the commissioner appointed in compliance with this act shall receive two dollars for each certificate issued, to be paid by the party receiving the same; and said commissioner shall do and transact the business and duties required of him at the different county seats of each and every county within the limits of said colony.

Art. 2316. [8] That to entitle the colonists to the benefits of this act, they shall be required to prove by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to the twenty-fifth of October, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither; *provided*, that they shall not be required to prove that they have cultivated land.

Art. 2317. [9] That to entitle the heirs and legal representatives of such citizens as have died subsequently to their citizenship, within the limits of said colony, to the benefits of this act, the proof and requirements shall be the same as in the foregoing, except the oath; instead of which there shall be substituted the oath of the heirs and legal representatives of such citizens, testifying to the best of their knowledge and belief to the truth of the facts herein required to be proven.

Art. 2318. [10] That upon the presentation of said certificate, with the proper field-notes of the surveyor, made in accordance with the law, the Commissioner of the General Land Office shall issue the patents accordingly, to all who may be entitled to the same.

Art. 2319. [11] That it shall be the duty of the commissioner appointed by virtue of this act, to send to the Commissioner of the General Land Office, a monthly list, under oath, containing a description of certificates issued in compliance with this act; and he shall also keep a record in a well-bound book, showing the quantity of land

for which each certificate issued, the names of the parties obtaining the same, and the names of the witnesses who made the proof; and said commissioner shall deposit said record-book in the General Land Office, at the expiration of the time limited in this act for granting certificates.

Art. 2320. [12] That the commissioner appointed by virtue of this act, before he enters upon the duties of his office, shall give bond in the sum of twenty thousand dollars, with security to be approved by the district judge of the ninth judicial district, which bond shall be drawn payable to the State of Texas, and shall be conditioned that the commissioner shall faithfully and impartially discharge the duties imposed on him by this act; and shall also take the oath required by the Constitution, which oath shall be endorsed on the said bond, and with the same shall be deposited in the office of the Secretary of State.

Art. 2321. [13] That said commissioner shall continue to perform the duties imposed on him by this act for and during the term of eighteen months from and after his appointment as aforesaid, and no longer.

Art. 2322. [14] That in case the claim of any individual be rejected by said commissioner, such claimant shall have the right to appeal to the District Court of the county where he or she applied, under the rules and regulations governing appeals from Justices' Courts to the District Courts, except that the appeal-bond be required only to cover the costs of appeal; and in case the judgment be affirmed, the appellant shall pay all costs; and in case the judgment be reversed, the claimant shall be entitled to a certificate from the clerk of the District Court, for which he shall pay to the clerk of the court two dollars; which certificate shall entitle the owner to all the right to which he would have been entitled under a certificate from the commissioner aforesaid.

No. 16.

ACT OF CONGRESS U. S., SEPTEMBER 9, 1850.

U. S. Statutes, p. 446.

An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a Territorial Government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas: *Provided*, The said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreeement.

Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the

end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Fifth. Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided,* That nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March 1, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise.

No. 17.

ACT OF NOVEMBER 25, 1850.

Paschal's Digest, p. 193.

An Act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by her Exterior to said Boundaries and of all her Claims upon the United States, and to Establish a Territorial Government for New Mexico."

Article 443. Whereas, said propositions are contained in the first section of said act in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States

and upon the said State of Texas: *Provided*, The said agreement by the said General Assembly shall be given on or before the first day of December, eighteen hundred and fifty:

Art. 444. [1] The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of North latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Art. 445. [2] The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Art. 446. [3] The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Art 447. [4] The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Art. 448. [5] Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided*, That

nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise; therefore,

Art. 449. [1] That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

Art. 450. [2] That the Governor of this State be, and he is hereby requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress.

No. 18.

ACT OF JANUARY 24, 1852.

Pamphlet Laws, Chapter lxv., p. 35.

An Act for the Relief of the Settlers in the Territory commonly known as Mercer's Colony.

Section 1. Be it enacted by the Legislature of the state of Texas, that the Commissioner of the General Land Office is hereby required to issue patents upon all surveys made by virtue of certificates issued to settlers as colonists in the territory commonly known as Mercer's Colony, under the same terms and conditions as required by law in other cases; *provided*, that no such certificate shall be located without the limits of the territory generally known as Mercer's Colony, prior to the rendition of the decree of twenty-eighth day of October, A. D. eighteen hundred and forty-eight, by the District Court of Navarro county; *provided*, that nothing contained in this act shall be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract or rights growing out of the same.

Art. 2. That this act shall take effect from its passage.

Approved January 24, 1852.

No. 19.

ACT OF FEBRUARY 16, 1852.

Pamphlet Laws, p. 136.

An Act Supplementary to and Amending an Act for the Relief of Citizens of Mercer's Colony, of date February 2, 1850.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That section eight of the above recited act be so amended that it shall only be necessary for the colonists applying for lands to prove that they were resident citizens of said colony January 29, 1849, but in all other respects they shall fully comply with the provisions of said eighth section of said act.

Sec. 2. That the proof required by the first section of this act shall be made before the district court of the county in which the party resided January 29, 1849; and it shall be the duty of the district court to hear and determine, and award or refuse certificates to the parties applying under the provisions of this act, and the act to which this act is supplementary, in the same manner as the commissioner appointed under said act might or should have done under the same.

Sec. 3. That no petition shall be required, and it shall only be necessary for the clerk of said court, upon the application of the party desiring to avail himself of the provisions of this act, to enter the name on the applicant on his docket, and the said application shall be heard in its order as other cases upon the docket, unless the court shall appoint some particular day of the term for hearing the same.

Sec. 4. That the certificates for the claims established under this act shall be issued by the clerk and be countersigned by the judge of the court issuing the same, and of the issues of said certificates the clerk shall make monthly returns to the Commissioner of the General Land Office; in no case shall the clerk's fees be more than three dollars, and he shall be entitled to said fees from the applicant should he fail or succeed in his application.

Sec. 5. That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March 23, 1850, shall apply and be of force in regard to all rights sought to be established, and all certificates issued under the provisions of this act, except in the amendment

provided for by the first section of this act; *provided*, not more than twenty certificates shall be proven up.

Sec. 6. That this act take effect from and after its passage.

Approved February 16, 1852.

No. 20.

ACT OF JANUARY 21, 1854.

Pamphlet Laws, p. 9.

An Act supplementary to An Act supplementary to and amending "An Act for the relief of the citizens of Mercer's Colony," of date February second eighteen hundred and fifty.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March twenty-third, eighteen hundred and fifty, shall apply and be in force in regard to all rights sought to be established, and all certificates issued under the provisions of the act to which this is a supplement, *provided*, that no certificate shall be granted or issued under the provisions of this act, or the act to which this is a supplement, unless the applicant shall make all the proof required by the above recited act, and shall also prove, by his or her own oath, supported by the oath of two respectable witnesses, that he, or his or her ancestors or decedents, as the case may be, emigrated to and settled with the limits of the territory commonly known as Mercer's Colony, on or before the twenty-ninth day of January, A. D. eighteen hundred and forty-ninth; and should any certificate be obtained by fraud or perjury, or otherwise than according to the true intent and meaning of this act, such certificate, and the patent issued thereon, shall be utterly void.

Sec. 2. That the fifth section of an act supplementary to and amending an act for the relief of the citizens of Mercer's Colony, of date sixteenth of February, eighteen hundred and fifty-two, be and the same is hereby repealed; and that this act take effect from and after its passage.

Approved January 21, 1854.

No. 21.

ACT OF DECEMBER 17, 1857.

Pamphlet Laws, p. 21.

An Act to repeal an Act supplementary to an Act for the Relief of the Citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856.

Section 1. Be it enacted by the Legislature of the State of Texas, That an act supplementary to an act for the relief of the citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856, be and the same is hereby repealed; *provided*, that the passage of this act shall not in any way affect the right of parties who have received certificates for land from any district court under the provisions of the act hereby repealed.

Sec. 2. That this act take effect and be in force from and after its passage.

Approved December 17, 1857.

ACT OF FEBRUARY 28, 1855.

U. S. Statutes, vol. 10, chap. 129, p. 617.

An Act to provide for the Payment of such Creditors of the late Republic of Texas as are comprehended in the Act of Congress of September nine, eighteen hundred and fifty.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That in lieu of the sum of five millions of dollars, payable to the State of Texas, in five per cent. stock of the United States, by the act entitled "An act proposing to the State of Texas the establishment of her Northern and Western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico," passed September ninth, eighteen hundred and fifty, the issuing of which stock was restricted by the first proviso to the fifth proposition contained in the first section of said act, the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the creditors of the late Republic of Texas, who hold such bonds, or other evidences of debt for which the revenues of

that Republic were pledged, as were reported to be within the provisions of the said act of September the ninth, eighteen hundred and fifty, by the report of the late Secretary of the Treasury to the President of the United States, and approved by him on the thirteenth day of September, eighteen hundred and fifty-one, or which come within the provisions of said act, according to the opinion upon the Texas compact of the present Attorney General of the United States, addressed to the Secretary of the Treasury, under date of September twenty-sixth, eighteen hundred and fifty-three, the sum of seven millions seven hundred and fifty thousand dollars, to be apportioned among the said holders pro rata: *Provided*, That the interest on the debt, embraced in this act, shall be determined by the existing laws of the State of Texas.

Sec. 2. And be it further enacted, That in all cases where the State of Texas may have paid any portion of the debt described in this act, the said secretary shall refund to the proper officer of said State the amount actually so paid by the State, upon the presentation at the Treasury Department of the evidences of said debt, on which the said State may have made such payment: *Provided*, The said sum shall not exceed the proportion which would have been allowed to the creditor or creditors, if such payment on said evidences of debt had not been made by the State of Texas; and where the said sum that may be refunded to the State of Texas by the provisions of this section is less than the proportion which would have been allowed under this act to the holders of such evidences of debt, had such payment not been made them, such holders shall be entitled to receive the difference between said sum and the proportion they would have received under this act if no payment had been made them; and where any original certificates or other evidences of debt have been surrendered to the authority of the State of Texas, and new certificates issued therefor by said State of Texas, such new certificates shall be received as evidences of the original amount of the claim.

Sec. 3. And be it further enacted, That no payment shall be made under this act, to any holder of said securities, or evidences of debt, unless the said holder shall first execute to the United States a receipt for the said payment, in which said holder shall forever release all claim against the United States for or on account of the said securities, or evidences of debt; also, similar releases to said State of Texas; and the said certificates, or other evidences of debt, shall then be deposited with the Treasury Department.

Sec. 4. And be it further enacted, That before payment of the moneys aforesaid, the Secretary of the Treasury shall give notice, by public advertisement, for the space of ninety days, of the time at which said payment will be made; and no payment shall be made on any bond, certificate, or evidence of debt, which shall not, thirty days before the time limited by said notice, be presented at the Treasury Department.

Sec. 5. And be it further enacted, That the sum of seven millions seven hundred and fifty thousand dollars be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, for the purpose of carrying into effect the provisions of this act.

Sec. 6. And be it further enacted, That this act shall not take effect until it shall be assented to by an act of the legislature of the State of Texas, and a copy of the act of said State, duly authenticated, deposited in the Treasury Department at Washington, nor until the legislature of the State of Texas shall pass an act withdrawing and abandoning all claims and demands against the United States, growing out of Indian depredations or otherwise.

Approved, February 28, 1855.

"G."

ACT AUGUST 12, 1870.

2 Paschal's Digest Statutes, p. 1443.

Section 5. "The holder of any genuine land certificate, or other valid land claims against the State of Texas, shall hereafter have the right to locate the same upon any part of the public domain of the State not subject to the claim of actual occupants, as prescribed in the foregoing sections of this act, and in accordance with the laws now in force in reference to the location, surveying, and patenting of lands in this State; *provided*, that all such certificates shall be located, surveyed, and returned to the general land office by the first day of January, eighteen hundred and seventy-five, or be forever barred.

G. 1.

ACT OF MAY 16, 1871.

2 Paschal's Digest Statutes, p. 1443

Section 3. Section five of the aforesaid act, approved August 12, 1870 [shall] be so amended as to read in the following words, to wit: The holder of any genuine land certificate or other valid land claim against the State, including railroad and colony certificates, and all other certificates that have not been declared void by some competent authority, shall have the right to locate the same on any part of the public domain of the State, not included in any railroad reservation, nor in any State section of land surveyed by virtue of any railroad certificate, nor upon any island, and not subject to the claims of actual occupants, and have the same surveyed and patented in accordance with existing laws; *provided*, that all such certificates and land claims shall be located, surveyed, and returned to the general land office by or before the first day of January, A. D. eighteen hundred and seventy-five, or be forever barred.

OFFICE SUPREME COURT U.S.
FILED
MAR 2 1883
JAMES H. McKENNEY, Clerk.

109-297

Supreme Court of United States.

OCTOBER TERM, 1882.

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas. . . . . Appellant,

VERSUS

WILLIAM PRESTON. . . . . Appellee,

No. 863.

AND

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, ... Appellee.

No. 864.

ARGUMENT FOR PRESTON.

JOHN MASON BROWN,
Of Counsel.

COURIER-JOURNAL JOB-ROOMS PRINT.

Supreme Court of the United States.

OCTOBER TERM, 1892.

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellant,

VERSUS

WILLIAM PRESTON, ... Appellee,

No. 863.

AND

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellee.

No. 864.

Statement of the Case.

The controversy presented by this record involves the consideration of two appeals. In the first it is sought by the Commissioner of the General Land Office of the State of Texas to reverse a decree of the Circuit Court of the United States for the Western District of Texas. The second appeal, prosecuted upon the same record, seeks to secure for the appellant Preston a correction of certain alleged errors to his prejudice, and is particularly directed to a further and more efficient relief than that accorded in the lower court.

The facts which lie at the basis of the litigation are, it is conceived, established beyond any probability of serious controversy. They are in large degree established by documentary

evidences drawn from the archives of the State of Texas. They are in part confirmed and recited in the judicial records of that State, and in matters of parol proof are sustained by unattacked and uncontrovertible testimony.

The Republic of Mexico, having achieved its political independence, began as early as the year 1825 a system of colonial policy the object of which was to induce the settlement of that vast territory of which Texas was a part. It held out promises of large grants of lands to those who might bring into what was then a solitude, bodies of pioneers to defend its frontier and till its soil. The American population that, prior to 1836, settled in Texas, was attracted by this policy, and in after years continued it.

The revolution which ended in the acknowledgment of Texan independence did not change the views of her ablest men either as to the necessity for an encouragement of immigration, or the best method of inviting settlers from abroad.

The old policy was continued and the old methods adhered to.

The new Republic found itself a recognized nationality, heavily loaded with debt, with little or no revenue, possessed of an immense landed domain, and wanting most of all things a yeomanry to populate and defend it. Its frontier toward the north and west was open to incessant Indian incursions. The very vastness of its area made it the weaker, and the sparseness of its population tempted the attacks which it was not strong enough to repel.

The Republic of Texas therefore was constrained by necessity no less than by wisdom to invite in a generous way those who would become its citizens and soldiers. It needed *men* above all things, and how to procure men was the first problem that addressed itself to Austin and Houston and their compatriots.

The men who won the campaign of San Jacinto and founded the new Republic were, almost all of them, former citizens of the United States. They looked for aid to the country from whence they had themselves come, and their first invitation

was extended to those whom they had known in former years. They hoped for an American immigration and took measures to attract it.

At a very early day, therefore, after its independence was assured, the Republic of Texas enacted laws designed to promote the settlement of families within its borders and particularly upon the then exposed frontier. By an act of 4th February, 1841 (see Appendix A to this brief), full power was given to the President of the Republic to conclude contracts with *empressarios*, as they were termed, stipulating on the one side for the importation and settlement of colonists, and on the other for a reward, in lands, to the contractor. Large areas, including thousands of square miles, were demarked to the various immigration contractors, within which they were to locate their colonists and receive their own lands.

No less than twelve such contracts had been concluded before that with Mercer (out of which this litigation arises) had been formed. The policy was general and established.

On the 29th January, 1844, President Sam. Houston, in the name and behalf of the Republic of Texas, entered into a contract with Charles Fenton Mercer. It was a contract of colonization and the last one entered into by the Republic. It is set out fully in the record (printed record, 91 to 100) and is too voluminous to be copied here. Its general features may be briefly summarized. Mercer undertook to introduce colonists into the territory defined by the contract, and which may be roughly described as being between the Red River and the Brazos, on both sides of the Trinity River.

The entire charge was to be borne by him and his associates. The care of the colonists, their supply of arms and ammunition, their cabins, their provisions, were committed to him. He bore all cost of the enterprise and paid all charges of surveys.

He was required to make periodical reports to the Secretary of State of the Republic, as well concerning the success of his colonization scheme as of the organization and changes of his association.

He was to introduce not less than one hundred families be-

fore the 1st May, 1845; as many as two hundred and fifty families in the first two years, and one hundred and fifty families in each of the next succeeding three years.

The compensation secured to Mercer was fixed at a full section of six hundred and forty acres of land for each emigrant family located, and a further bonus of ten sections for each one hundred families brought in. He was also secured the valuable pre-emptive right of acquiring the other lands within the colonial boundary, on payment of a cash fee of twelve dollars per section and the surrender of audited liabilities of the Republic in a specified amount.

The term of five years was fixed as that within which the contract was performed.

The selection of Mercer as an empressario by President Houston was not to be wondered at. Besides the personal relations that had subsisted between them, and which were of a kind that justly inspired confidence, the active friendship of Mercer for the struggling Republic had been conspicuous and useful. His long service in the Congress of the United States had gained for him a large acquaintance and influence. His personal character was of the highest, and his enthusiasm for Texan independence had been proved by liberal contributions of money in its hour of need.

The record shows that the remainder of Mercer's fortune was expended in faithfully performing the colonization contract. Not one cent in money, not one acre of land, has ever been given him or his associates in compensation.

The validity of the colonization contract with Mercer could scarcely be questioned, for it rested on the same statutory authority that supported the entire colonial policy. It was violently complained of by some who opposed the colonial policy, but its strict legality can not be doubted in the light of the decisions of the Supreme Court of Texas (see *Melton vs. Cobb, 21 Texas, 530*), expressly concluding the point.

Mercer lost no time nor spared any effort in fulfilling his contract.

He at once formed an association and induced his friends to

join it. Their articles appear in the record (printed record 143-149) and were in due time filed with the Secretary of State.

He employed surveyors and sub-agents, opened credits at New Orleans and elsewhere, established a depot of supplies and ammunition, and himself actively supervised the entire enterprise. His reports to the Secretary of State, some of which are given in the record, authenticated by the State seal, show that he was successful beyond the stipulations of his contract in procuring colonists.

Unfriendly legislation was resorted to for the purpose of embarrassing his enterprise. On the 3d February, 1845, a joint resolution of the Texan Congress required that he should have the lines of the colony actually surveyed and marked, under penalty of forfeiture. (See Appendix B.)

The effort to defeat him failed, for in excess of any contract duty he completed the survey and filed his map with the Secretary of State within the prescribed time. A copy of it appears in the record. (Printed record, page 112.)

Another blow was aimed at his half-completed work in the convention called to frame a Constitution with a view to annexation. An ordinance (futile and inoperative as the Texas courts have held) was passed and appended to the Constitution (Appendix C), having for its object the nullification of the colonial contracts. Yet Mercer steadily persevered, and although pretended proceedings were resorted to to forfeit his rights, he never relaxed his efforts till the expiration of five years saw his full work completed.

From the 24th of January, 1849, Mercer was a suppliant for the compensation he had so fully earned. He was treated with neglect, almost with indignity. He could get no redress from the legislature of Texas, and was not admitted to assert his claim in her courts. The number of his colonists was ascertained by a commissioner appointed under legislative authority (printed record, pages 116, 142), but just compensation was still denied him.

He died at last worn out in the long and fruitless struggle

for his hard-earned lands, leaving to his friend Hancock the assertion of the claim, as his assignee and transferee.

Hancock became the chief agent and trustee of the association known in this record as the "Texas Association."

The record shows how diligently he labored to induce the political department of the State of Texas to do him justice. The war intervened, political commotions defeated all his best-laid plans, and finally he filed the bill of complaint here exhibited.

Revivors have changed the parties, appellant and appellee.

A very full hearing upon demurrer was had before Mr. Justice Woods, at that time circuit judge, and the law of the case quite definitely settled as to all matters involved in the original bill and the application for preliminary injunction. His opinion is incorporated into the record (printed record, page 338, and following).

The questions of jurisdiction, of equity in the bill, and of the propriety of conserving the lands within the colonial area to answer the demand of complainant, were fully considered and ruled in favor of the Texas Association. And an injunction *pendente lite* was granted restraining the Land Commissioner of Texas from issuing land patents, certificates, or other papers calculated to prejudice complainant's substantial relief.

The original bill was directed at relief as to lands within the colonial boundary.

By permission of Judge Woods an amended bill was filed which enlarged the averments of the nature and effect of the trust assumed by the State of Texas, and the area to which it applied. It prayed also for an enlarged relief, looking to the public domain outside the colonial limits for satisfaction, and to a mandatory injunction to compel the delivery of patents and certificates in satisfaction of the colonial compensation to which Mercer was entitled.

Proof was taken upon issues joined on the bill and amendment, and a final decree passed by Judge Pardee.

From that decree, which will be found on pages 335 and 336 of the printed record, it will be seen that the prayers were

granted in part and refused as to some matters. Hence the two appeals.

The decree held:

1. That the complainant's allegations were true and supported by the proof.
2. That the Commissioner of the General Land Office of Texas be perpetually enjoined from issuing patents or other documents of title as to lands within the colonial limits to any persons not in privity with the complainant.
3. That the Land Commissioner be further enjoined from hindering or obstructing complainant in surveying, selecting, entering, or claiming lands within the colonial limits, or performing any conditions or stipulations devolved under the colonial contract.

By reference to the opinion of Judge Pardee, which for convenience of reference is submitted in print with this brief, it will further appear that the learned judge declined to grant to complainant his prayer.

1. For a mandatory injunction compelling the issue of patents and certificates for 1,376 sections of land as the colonial contractor's compensation.
2. For a mandatory injunction compelling the issue of patents and certificates for other 1,376 sections, as pre-emptive right under the colonial contract, on complainant's tendering the stipulated price.
3. For a mandatory injunction securing to complainant the right to locate certificates and patents upon any vacant or unappropriated lands of Texas, within or without the limits of Mercer's Colony.

From the decree as passed the Land Commissioner has appealed.

From the refusal to grant the further relief prayed the complainant now prosecutes his appeal on the same record.

Errors Assigned by Appellant.

The circuit court declined to give relief to the extent prayed by complainant:

1. It refused to grant a mandatory injunction inhibiting the Land Commissioner's further refusal to issue certificates and patents for the ascertained quantity of land (1,376 sections), under the contract, within the colonial boundaries, or its equivalent in value elsewhere.

2. It refused a similar mandatory injunction inhibiting his refusal to issue certificates and patents on tender of the contract price, for the alternate 1,376 sections within the colonial boundaries, or its equivalent in value elsewhere.

3. It refused to grant a mandatory injunction, the effect of which would be to permit the location of complainant's patents and certificates on any vacant and unoccupied lands of Texas, within or without the limits of Mercer Colony.

4. It refused to recognize complainant's claim as a trust fastened upon the entire public domain and enforceable in equity as against the unappropriated lands.

Points of Argument.

I.

The contract between the Republic of Texas and Charles Fenton Mercer (printed record, page 91) is in terms, as well as in legal effect, a *grant of lands*. (Printed record, page 98.)

And this grant has been held by the Supreme Court of Texas to be a *valid* grant.

Melton vs. Cobb, 21 Texas, 539, decided in 1858.

This grant of lands is upon conditions subsequent, as its terms clearly declare.

And a grant of lands on condition subsequent operates to raise a trust in the grantor for the benefit of the grantee.

The Republic of Texas therefore, by force of the grant, became a trustee for Mercer as to all lands within the colonial boundary.

It is competent for the United States or for any State of the Union to become a trustee.

Perry on Trusts, section 41.

Yosemite Valley Case, 15 Wallace, 77.

The numerous authorities to the effect that a grant of lands by the State, conditioned as to future payment by the grantee, constitutes the State a trustee, are collected and commented upon in

Washburn on Real Property, 3d edition, of 1868, vol. 3, top page 174 *et seq.*, side page 525 *et seq.*

In such a case the grantee of lands takes an immediate vested estate, defeasible on non-performance.

Washburn on Real Property, *ut supra.*

It follows therefore that by force of the grant the Republic of Texas became trustee for Mercer, and Mercer acquired *eo instanti* a vested estate defeasible. And by his full performance of the conditions the defeasible estate was converted into an indefeasible estate.

II.

The trust of which the *Republic* of Texas was thus trustee being fastened upon the described lands by virtue of the grant, the vested estate was not extinguished by the annexation of Texas to the Union.

It passed and attached to the *State* of Texas as the sovereign successor of the *Republic*, and the State of Texas thus became and remains trustee.

So it was that the King of Spain being trustee of certain lands, the United States as his successor in the sovereignty over those lands was bound by the trust.

New Orleans vs. United States, 10 Peters, 736, 737.

And so where the King of Spain had by his own act or the acts of his lawful political agents become a trustee for a claimant of lands, this was held to be a severance of the lands from the royal domain and to impress the trust upon them; and the United States, succeeding to the sovereignty, stood in the same attitude as trustee.

United States vs. Smith, 10 Peters, 331, 335.

It matters not whether the title of the grantee be complete or merely inchoate, the trust equally attaches and adheres.

In this respect the relation is not changed; the new government takes the place of that which passes away.

Soulard vs. United States, 4 Peters, 512.

So perfectly vested is such a right in the grantee, and so strict the trust, that a patent from the United States issued pursuant to an act of Congress could not operate to destroy such a right or title acquired under the former government.

New Orleans vs. De Armas, 9 *Peters*, 236.

And it was held in the case of Arredondo, that his contract made with the King of Spain, whereby he took a grant of lands conditioned that he would settle two hundred Spanish families thereon, vested such an immediate estate as bound the United States as political successor of the Spanish king, and could not be divested except for nonperformance.

United States vs. Arredondo, 6 *Peters*, 691.

This principle of trusteeship by succession to the sovereignty has also been repeatedly applied to questions arising out of the several compacts between the States and the cessions of territory.

Thus the compact between Pennsylvania and Virginia.

Sims, lessee, vs. Irvine, 3 *Dallas*, 456.

Marlatt vs. Silk, 11 *Peters*, 21.

And the compact between Virginia and North Carolina.

Robinson vs. Campbell, 3 *Wheaton*, 218, *et seq.*

The cession of territory and the Ohio boundary.

Handley's lessee vs. Anthony, 5 *Wheaton*, 377, *et seq.*

And the compact between Kentucky and Virginia.

Green vs. Biddle, 8 *Wheaton*, 13, *et seq.*

The entire subject is reviewed and the cases collected and discussed by Justice Baldwin in

Lessees of Pollard vs. Kibbe, 14 *Peters*, 390, *et seq.*

The relation of the Republic of Texas, and of the State of Texas its sovereign successor, to Mercer was and is therefore that of *trustee*.

III.

And this relation, of trustee and *cestui qui trust*, concerns an *express trust;* a consideration of importance as will hereafter be shown.

An express trust is thus defined by an approved writer:

> "Express trusts are also called direct trusts. "They are generally created by instruments that "point out directly and expressly the *property*, "*persons*, and *purposes* of the trust; hence they "are called direct or express trusts, in contradis- "tinction from those that are implied, presumed, "or construed by law to arise out of the transac- "tions of the parties."
>
> *Perry on Trusts, section* 24.

The contract of Mercer exactly responds to every feature of this definition. The *property* is pointed out by metes and bounds, the *persons* are identified, and the *purposes* are distinctly stated.

The State of Texas is, therefore, as political successor of the Republic of Texas, the *trustee of an express trust* as to all the lands within the boundary of the colonial grant, for the benefit of Mercer and his associates.

IV.

The proposition that the State of Texas became and is trustee of an express trust is capable of demonstration by another line of argument founded on its political history.

And as this argument is pursued it will be found that the trust is of surpassing dignity, as regards its sanction, and of widest reach as regards the estate upon which it fastens.

The Republic of Texas became a State of the American Union under Articles of Annexation proposed by the United States and ratified by both Republics.

Paschal's Digest Laws of Texas, 44, 45, 46; and see Appendix D herewith.

The terms and stipulations between the two high contracting parties are embodied in the first and second sections of the joint resolution of the Congress of the United States approved 1st March, 1845, incorporated into the Texan joint resolution of 23d June, 1845, and the adopting ordinance of 4th July, 1845.

These Articles of Annexation, after providing for the cession of public property to the United States, stipulate, in the second clause of the 2d section, as follows:

> "Said State . . . shall retain all the public "funds, debts, taxes, and dues of every kind, "which may belong to or be due and owing said "Republic, and *shall also retain all the vacant and "unappropriated land lying within its limits*, TO BE "APPLIED TO THE PAYMENT OF THE DEBTS AND LIA- "BILITIES OF SAID REPUBLIC OF TEXAS, *and the* "RESIDUE *of said lands*, AFTER DISCHARGING SAID "DEBTS AND LIABILITIES, *to be disposed of as such "State may direct; but in no event are said debts and*

"*liabilities to become a charge upon the government*
"*of the United States.*"

The italicised portions of the resolution are specially referred to.

The phraseology used shows that the United States fully appreciated the settled principle of public law that an incoming sovereign, if he take the public domain takes it *cum onere*.

To have accepted the lands of Texas must have carried with it the duty of satisfying the creditors of Texas, and an assumption of her trusteeship.

Further, to have made no declaration as to the lands of Texas would have been in effect a taking of them *cum onere*, for the mere fact of the amicable absorption of Texas into the Union carried, by force of the new national relation, a surrender of the public property of the late Republic.

And, therefore, had nothing been said in the articles, the United States, would have been, by operation of the treaty or compact, substituted to the rights, duties, and powers of Texas. It was competent for the contracting Republics to stipulate as they chose, and they chose to declare that the United States, the new sovereign, would not take emolument nor assume duty as to the lands. But, lest there should be a lapse in the dominion over the lands, the Articles declared that the State of Texas should retain them

"to be applied to the payment of the debts and
"liabilities of said Republic of Texas."

Here is a distinct and emphatic stipulation and declaration of an express trust.

The dignity of the instrument enhances the obligation of the trust. It is a treaty of annexation in which vast rights were negotiated.

Being a treaty the instrument becomes the highest law to the contracting powers and their courts.

Not only was a trust thus stipulated and accepted, but a further provision of the Articles looked to a guaranty—and a very ample one—for the faithful performance of the trust.

It was not supposed, of course, that all the lands of Texas

would be needed to discharge the debts and liabilities of the Republic. Yet the new State was vested with the vast surplus upon an express condition and limitation that it should not be alienated until the debts and liabilities of the Republic of Texas should first have been discharged

> "and the residue of said lands AFTER discharging
> "said debts and liabilities, to be disposed of as
> "said State may direct."

And as the State of Texas has no title to any lands, save through and by force of the Articles of Annexation, the conclusion can not be escaped that every acre of the public domain of Texas came to the State subject to an express trust for the payment and discharge of the debts and liabilities of the Republic.

The nature of the agreement for annexation forbids any impairment of its stipulations.

Whether it be called a *Treaty* or a *Compact*, or an agreement in the nature of a treaty, is all one, as was held in *Green vs. Biddle.*

If it be a treaty the express provision of the Constitution makes it part of the supreme law of the land. If it be a compact, another and equally binding provision insures its inviolability as a contract.

> "A slight effort to prove that a compact between
> "two States is not a case within the meaning o
> "the Constitution, which speaks of contracts,
> "was made by the counsel for the tenant, but
> "was not much pressed. If we attend to the
> "definition of a contract, which is the agreement
> "of two or more parties to do, or not to do, cer-
> "tain acts, it must be obvious that the proposi-
> "tions offered and agreed to by Virginia, being
> "accepted and ratified by Kentucky is *a contract.*
> "In fact the terms compact and contract are syn-
> "onymous; and in *Fletcher vs. Peck* the chief
> "justice defines a contract to be a compact be-
> "tween two or more parties. The principles laid
> "down in that case are that the Constitution

"embraces all contracts executed or executory,
"whether between individuals or between a State
"and individuals, and that a State has no more
"power to impair an obligation into which she
"herself entered, than she can the contracts of
"individuals."

Green vs. Biddle, 8 Wheaton, 92.

Whether therefore the State of Texas be regarded as created by the Articles of Annexation and holding under them (which the wording of the articles clearly indicates), or as a contracting party to the Articles, is immaterial. The State in either case is bound by them, and they in either case are preserved inviolable by constitutional sanction.

The declared express trust is thus sacred.

And, to recapitulate at this point, the State of Texas is trustee of an express trust for the benefit of Mercer. This trust by force of the contract attaches to the colonial lands.

By force of the annexation articles it fastens upon the entire domain.

It is conceived that it was an error in the circuit court to refuse to so adjudge.

V.

It will further be seen as the subject is explored that the high contracting parties to the Articles of Annexation well understood that the debts and liabilities of the Republic of Texas were a specific charge upon all the property that had belonged to the Republic of Texas, and so intended to be, except where expressly stipulated to the contrary.

With an eye to this the United States, while taking, as new sovereign, the public edifices, fortifications, barracks, ports, and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property pertaining to the public defense, that had belonged to the Republic of Texas, was careful to stipulate that the debts and liabilities should not become a charge upon the government of the United States, and to sup-

port this stipulation, in morals and in substantial fact, there was given to the State of Texas the immense landed domain, saddled with an express trust to pay debts and liabilities.

Having thus provided for the claimant, the creditor of the Republic, the United States could with propriety decline that attribute of trusteeship which invariably accompanies the peaceful acquisition of territory.

The persons holding claims against the Republic of Texas were, almost all of them, like Mercer and his associates, citizens of the United States, and in that lay an additional reason for the trust.

And thus, as I contend, does it appear from the words of the treaty of annexation and from the contemporaneous acts of the contracting nationalities that a trust was intended and declared and imposed, purposely upon the entire lands of Texas.

VI.

There is a further fact in the history of the country and of Texas which confirms the arguments already advanced. It relates to the compromise measures of 1850.

For the purpose of extending the line of 36° 30′ westward, it became necessary to reduce the actual or asserted boundaries of Texas, and consultative legislation by Congress and by Texas was requisite.

The boundaries of the Republic of Texas, as declared by her assertion of independence, were from

> "the mouth of the Sabine River, and running
> "west along the Gulf of Mexico three leagues
> "from land, to the mouth of the Rio Grande,
> "thence up the principal stream of said river to
> "its source; thence due north to the forty second
> "degree of north latitude; thence along the
> "boundary line as defined in the treaty between
> "the United States and Spain to the beginning."
>
> See Paschal's Digest Laws Texas, 192.

It will be readily apparent that this claim of boundary had been virtually admitted in the ratification of the articles of annexation, for its assertion had been made long before, and it must have been conceded by description in the articles.

It is equally clear that it was impossible to extend the compromise line of 36° 30′, so as to throw the territory north of it out of Texas and into a territorial condition, except by agreement with Texas.

With this view the act of Congress of 9th September, 1850, was passed, and was accepted by the State of Texas. Its effect was to cede to the United States all the territory north of the Red River and the parallel of 36° 30′.

The consideration paid to Texas for the cession of her territory exterior to this new boundary was $10,000,000.

Paschal's Dig. Laws Texas, 193–4, and see Appendix E hereto.

The amount of land thus ceded to the United States was 67,000,000 acres, leaving to Texas 175,594,560 acres of public domain. And it was computed by an official report of the Land Office of Texas in 1852 that there would remain to Texas, after all claims and liabilities of every kind were satisfied therefrom, 111,812,079 acres of domain.

Gouge's Fiscal History of Texas, 131, 132, and 281.

But the arrangement went further. Not only did the State of Texas formally cede the exterior territory and relinquish any and all claim upon the United States for liability arising out of the debts and liabilities of the Republic, and for the public property ceded at the annexation, but Texas further consented that of the $10,000,000, one full half, or $5,000,000, should be retained by the United States in script for the benefit of the creditors of Texas.

What good reason could there be for this? The answer is at hand.

The trust created and imposed upon the State of Texas by the Articles of Annexation, as has been already shown, adhered to and affected every acre of the public domain acquired by the State under those articles. It was a trust of most dignified

creation sanctioned by international obligations. It covered the entire area of Texas (so far as the lands were public), and its lien ran northward to the 42d parallel—as far north as New York City—and from the old Spanish-American boundary on the east to the ill-defined mountain boundary on the west.

Now it was evidently in the mind of Congress that if the United States acquired this enormous exterior territory, and severed it from the State of Texas, it must be taken *cum onere*, that is, subject to the trust to discharge the debts and liabilities of the Republic of Texas.

That trust having attached at the annexation, could not be shaken off, even if public morals could have entertained the design.

The obvious guard against liability was the simple method pursued, of retaining in the hands of the United States a part of the $10,000,000 sufficient, as was supposed, to make safe; and thus, on the familiar principle of seeing to the application of the purchase-money, relieving the ceded lands from the trust.

The conduct of the United States and of Texas, in 1850, is explicable by no other theory than that here contended for—that the State of Texas became, in 1845, the trustee of an express trust as to all her lands, to secure the payment and discharge of the debts and liabilities of the former Republic.

The consummation of the entire business growing out of the cession of 1850 was had in 1855, when the Congress of the United States, by an act approved 28th February, and assented to by the legislature of Texas, called together the money creditors of the Republic of Texas, paid them in full, and paid over to the State of Texas the residue of the withheld $5,000,000 with accumulated interest.

Brightley's Digest U. S. Laws, 875, and see Appendix F hereto.

Thus the *debts*—the *money obligations*—of the Republic of Texas were finally discharged, and to that extent all the domain received by the State of Texas was released from the burden of the trust imposed at the annexation.

But although the *debts* of the Republic were thus canceled, its *liabilities* were not obliterated.

Among these were various contracts for colonization, which had been fully or partially performed by the empressarios. These were similar in their general features to the contract of Mercer.

They were solvable in land as was his, and were not capable of reduction to a certain money demand.

Consequently it was not possible for the authorities at Washington to discharge these *liabilities*, as they had paid the *debts*.

There was still, and yet is, abundant domain in the possession of Texas to fully discharge these liabilities, and so the Congress of the United States rested with the money payments.

The State of Texas has proceeded to finish the trust from the point where the payment of the debts in 1855 left it. By issue of land certificates, by permissive suits, by legislative bills of special relief, by compromises and adjustments, every *liability* save that to Mercer has been completly discharged.

He stands alone unpaid of all the colonial empressarios, and the settlement of his just claim is refused and obstructed by a recusant official.

It is not perceived why the right of the Mercer Colony associates to have their satisfaction in full from any lands of the State of Texas, and as a first claim upon them, should not be declared, and the Land Commissioner required to respect and facilitate such right and issue the necessary and usual certificates and patents.

VII.

And it may be here remarked, and in conclusion of this topic, that the relief by going at large upon the public domain of Texas, is not only most equitable but is imperatively necessary that justice be done.

The lands included within the limits of the Mercer Colony grant, and which are primarily liable to the satisfaction of the complainant's claim, are the most fertile, valuable, and thickly settled in the State.

The prosperous cities of Corsicanna, McKinney, Dallas, and others are upon or near the grant.

The average value throughout the colony has risen from twenty-five cents per acre in 1850 to a present average value of fully five dollars.

Printed record, page 299, 2 Cross Int. of Crockett.

There do not remain unappropriated of all the lands within the colony more than 10,000 or 12,000 acres—and this is "very poor and on an average worthless."

Printed record, page 259, 7th Int. of Spence.

The residue of the colonial tract has been patented to settlers, who have spent great sums in valuable improvements and made their homes there. A population of perhaps 150,000 persons occupies the grant.

The hardships attendant upon any unsettling of so great a number of titles can scarcely be overestimated. To evict the settlers who have bought their lands from the State of Texas and expensively improved them would be a manifest injustice, so long as it is easy to settle all claims by giving the relief in other public lands.

The infirmity of the titles within the Mercer grant, though founded on patents issued by the State of Texas, must be conceded. The holding is but in trust for the benefit of Mercer and his associates.

Johnson vs. Towsley, 13 Wallace, 85.
Wirth vs. Branson, 98 U. S. 121.

But by giving to complainant his relief in public lands exterior to the colonial boundary—and of which there is abundance—and so effectuating the trust recognized at the annexation, the innocent purchasers of lands within the colony will be assured in a quiet title while complete justice will be secured.

The identical land to which complainant would be entitled would thus indeed be lost to him; but he would be recompensed in other lands taken from another part of the same public domain. The equitable substitution of other lands would be accomplished in harmony with the views of this court as expressed in

Heydenfeldt vs. Dancy Gold Co. 93 U. S. 638,
and the opinion in
United States vs. Watkins, 97 U. S. 223.

VIII.

To escape the effect of the contract, which the Texas Supreme Court has declared valid (Melton vs. Cobb, 21 Texas, 539; Bryan vs. Sherley, 53 Texas), and to avoid the trust which has been fastened, the Land Commissioner of Texas has resorted to defenses which question the jurisdiction, which charge a repudiation of the trust, which plead non-performance of condition by Mercer, and assert a judicial forfeiture of Mercer's contract.

It is believed that the doctrine of Davis vs. Gray, 16 Wallace, 203, has been accepted as firmly fixed in our jurisprudence. The more recent case of the United States vs. Schurz, 102 U.S. 378, and the, as yet, unreported case of United States vs. Lee have been taken as closing discussion upon the proposition that every official is liable to suit to compel his performance of duty, or curb him in an abuse of it.

The doctrine has at last been reached and authoritatively announced that no man is above the law, and that no invocation of State immunity will be suffered to shield a recusant officer.

It will be noticed that the defense, on the ground of jurisdiction, was based upon the dissenting opinion in Gray vs. Davis, and the demurrer of the Attorney General of Texas was drawn in its exact language. (Printed record, page 11, first ground of demurrer.)

The only relief asked as against the Land Commissioner of Texas is that he be compelled to issue the documentary evidences of title to which the complainant is entitled. If he be withholding the certificates and patents when equity finds that they should be delivered, he can not complain if a court of equity make him do his duty.

IX.

It is submitted that the State of Texas has not only never repudiated the trust for Mercer's benefit, but has consistently recognized its obligatory force though neglecting to perform it.

It is true that efforts have been made on various occasions to procure a formal renunciation of the trust by the Republic or the State, but uniformly without success.

The estimate put upon the colonial grants by the leading men of the Republic of Texas is well shown by the published debates of the convention which was assembled in 1845 to draft a Constitution as preliminary to annexation. Much feeling was exhibited, and party spirit ran high. Some advocated an absolute annulment of all the colonial contracts. Others proposed that they should be suspended until Texas should be admitted into the Union, and others wished their validity tested by judicial procedure.

The party for nullification of the contracts was led by Mr. Jewett, while Mr. Rusk, though in opposition to President Houston, firmly resisted, and with the aid of Mr. Volney A. Howard, defeated the attempt. It was distinctly announced that any repudiation of contracts by the Republic would lead to a rejection of the projected annexation on the part of the United States.

Mr. Rusk, for example, said:

> "I take this broad ground that when this Con-
> "stitution goes before the Congress of the United
> "States, that body may imagine that we are here
> "destroying legal and vested rights. If they
> "should believe that, it is competent for them,
> "and it would be their duty to reject it. . . .
>
> "Again, it is a principle of law that if we put
> "it out of the power of the contractor to comply
> "with his contract, the obligation rests upon us
> "to comply with that contract to the letter. It
> "is not only a principle of law, as held in the cel-
> "ebrated Arredondo case in Florida, which went

"up to the Supreme Court of the United States;
"but it is a fundamental principle running through
"all contracts."

Texas Convention Debates, p. 618.

Mr. Howard took similar ground (page 638), as did Mr. Van-zandt (page 620), Mr. Evarts (page 616), Mr. Wright (page 611), Mr. Love (page 610), and others.

The proposition to repudiate the obligation of the colonial contracts was defeated in convention by a vote of thirty-six to eleven.

Texas Convention Debates 1845, page 709.

The Congress of the United States understood the colonial contracts as being liabilities of Texas, and a charge upon the public domain, and the eminent Texans who represented that State in Congress shared the opinion.

In the discussion of the $10,000,000 appropriation to Texas, in consideration of her cession of territory, in 1850, this was distinctly asserted by the principal speakers.

Mr. Rusk in the U. S. Senate said:

"She (Texas) had seen your debates by which
"her boundaries were recognized; she had seen
"your maps by which her boundaries were recog-
"nized; she had seen the joint resolutions which
"*guaranteed to her for the purpose of enabling her to*
"*pay her debt, all the vacant lands within her*
"*limits.*"

Cong. Globe 1850, vol. 22, part 2d, page 870.

Mr. Berrien in the same debate said:

"The United States took Texas with notice of
"the extent of her claim to boundary." (Page 874.)

And

"I am willing, therefore, in consideration of the
"transfer of territory to give her what shall be
"considered a fair equivalent for the territory to
"be ceded, and for *our own equitable liability under*
"*resolutions of annexation.*"

Cong. Globe 1850, vol. 22, part 2, page 876.

Mr. Howard—representing Texas in the House of Representatives, and who had been conspicuous in the legislation of the Republic, and as a debater in the convention of 1845—spoke of the proposed curtailment of Texas's northern boundary:

> "It deprives her of a large portion of the public domain; *all of which, within her limits, is "expressly pledged to the payment of the public debt "of the State, by the resolutions of annexation and "the faith of this government.*"

Cong. Globe, vol. 22, part 2, page 977.

Mr. Ewing, in the Senate, said

> "he recognized the obligation which the United "States came under, not to her (Texas) but to "the world to see that her debts should be fairly "paid."

Same volume, page 1564.

Mr. Butler, of South Carolina, said:

> "I hold this government bound to assume the "liability of paying those debts."

Same volume, page 1574.

And Mr. Pearce, of Maryland, who had charge of the measure, summed up the view which seemed common alike to friends and opponents of the bill.

Same volume, page 1576.

In the same year, 1850, the State of Texas passed an "Act for the relief of the citizens of Mercer's Colony," the same under which the witness Crockett acted as commissioner (printed record, page 296), and made his report of certificates issued to colonists of Mercer's Colony. (Printed record, pages 116–142.)

It provided in its first section,

> "That every colonist, or the heirs or adminis- "trators of such colonists, citizens of the colony of "Charles Fenton Mercer,"

should receive land.

Further legislative recognition was given in an act of January 24th, 1854, and 16th February, 1852, and again in acts of 21st January, 1854, and 17th December, 1857.

And the highest judicial authority of the State treats the colonial contracts as valid and beyond dispute, and the question concluded by legislative recognition.

Melton vs. Cobb, 21 *Texas*, 539.

Bryan vs. Sherley, 53 *Texas*.

It is difficult to perceive how a repudiation of the trust, even assuming that repudiation had been made, could be effective to prejudice Mercer. For, as has been remarked, the trust was created by treaty, or was a public contract, and had, in either case, the constitutional guaranty of its inviolability. The objection of one party to being further bound does not release him from his obligation to the other contracting party.

The trust being express the statute of limitations has no application, nor can lapse of time bar.

Perry on Trusts, section 836, and cases cited.

And when the particulars of performance, demand, solicitation, and long-continued and unsuccessful plea for justice are considered, all pretense of laches must fall to the ground.

X.

The futility of the plea of *non-performance* will best appear by some references to the record.

It is submitted that although all the conditions imposed are "subsequent," and therefore such as carry the burden of proof to the party alleging non-performance, the complainant has adduced a mass of documentary evidence and proof by depositions that must satisfy the most skeptical.

The contract between Mercer and the Republic of Texas was signed on the 29th of January, 1844. (Printed record, 91, *et seq.*)

It exacted among other things that Mercer should make periodical reports as well of the organization of his proposed

association, as of what from time to time was accomplished in the way of introducing colonists, surveying lands, and establishing a population on the northern frontier.

Samples of Mercer's reports have been incorporated into the record. They are authenticated by the seal of the State of Texas, and serve to illustrate the series of reports, numerous and voluminous, that are (or until the burning of the State capitol a few months since were) deposited in the State archives.

The first report made is one announcing the organization of the "Texas Association," communicated to the Secretary of State under date of 11th July, 1844, within five months from the making of the contract.

Printed record, pages 89, 90.

Although attacked and denounced by the demagogues whose stock in trade was abuse of Sam. Houston and all that he did, Mercer relaxed no effort nor failed in any part of his contract.

He located colonists with such rapidity that resort was had to hostile legislation to defeat, if possible, his compliance with the contract. For this reason a (totally invalid) resolution of the Texas Legislature was passed 3d February, 1845 (Hartley Dig. Laws Texas, page 660), requiring that an actual survey and demarkation of the boundaries of the colonial grant be made by the ensuing 1st May.

That the resolution was ineffectual, not only because it varied a contract but because of its palpable unreasonableness, did not weigh with Mercer, for he proceeded with redoubled diligence and zeal to do the thing required.

By the prescribed day, 1st May, 1845, he had filed with the Secretary of State the required map constructed from actual surveys.

See the map in printed record, pp. 112, 113.

It had been prepared by a corps of surveyors, of whom Pillans was the chief (Pillans's deposition, q. 3, printed record, page 159), and of whom Hunt, Taylor, Bean, and others were members.

Printed record, pages 160, q. 6; 161, q. 15; 163, cross q. 2, and cross q. 7.

It was at once lithographed and distributed, and though the defendant did not hesitate in his answer (printed record, 62), to impute forgery of the map, an insinuation to sustain which not a particle of evidence has been offered, copies of it came into the record from most widely separated sources and from witnesses of unquestioned integrity.

The reverened and venerable James Craik of Louisville produces a copy which he had himself had since 1845.

Printed record, 220, 2d question James Craik.

Another copy comes from the papers of Col. Edmund H. Taylor, of Frankfort, Ky. (printed record, 243, q. 5), another from Duvall (printed record, 231), another from Garnett (printed record, 184, q. 3), and still another from Birchett (printed record 193, q. 5).

The completion of the surveys and of the map did not cause any relaxation of effort on Mercer's part. So active were he and his agents that on 2d August, 1845, he was able to report to the Secretary of State 119 families as located prior to 1st May. An authenticated copy of this paper, which gives the names of each family and date of introduction, together with the names of witnesses of the facts and a verification of the list under oath, is given in the record.

Printed record, pages 101 to 105 inclusive.

Later in the same year Mercer, under date of 25th September, 1845, reports again to the Secretary of State of Texas an explicit statement of the affairs of the colony and of the Texas Association.

Printed record, pages 83 to 87.

He gives details of his faithful and diligent performance of his contract, and of the obstructions which he encountered. He showed how he had arranged funds, had provided stores, etc.

The particulars of the exact compliance with the contract—how the cabins were built, the rifles provided, the ammunition stored for distribution, the section-lines run, and the sections marked, is best shown in the comprehensive statement of the witness P. J. Pillans who made the surveys.

Printed record, pages 159 to 166 inclusive.

The periodical reports of Mercer were thus continued, as is shown by authenticated examples of their form and purport (printed record 87, and 171 to 181), and his success in introducing colonists was uninterrupted.

The contract expired by limitation on 29th January, 1849, and the latter reports of Mercer, as to the numbers and names of colonists, have not been furnished by the defendant from the records of his office. But the lack of these is repaired by an authoritative public document which appears in the record.

By an act of the Texas Legislature of 2d February, 1850, a commissioner was provided for, whose duty it should be to take proof of settlements within the colony and issue certificates to colonists entitled thereto.

Printed record—Bill of Complaint, page 6; answer, page 69; exhibit, Crockett's report, pages 116-142; Crockett's deposition, page 297.

This official ascertained 1,256 colonists within the grant, and duly reported that fact on 11th December, 1851, to the Governor and legislature.

A copy of his report, authenticated from defendant's office, is made part of the record.

Printed record, pages 116-142 inclusive.

It has been sanctioned and acted upon by the authorities of Texas from that day to this.

The acceptance of these colonists and giving to them lands was, it is conceived, such a recognition on the part of the State of Texas as would of itself dispense with any proof of performance by Mercer.

When 1,256 families had been visited, investigated, proved to be within the grant and entitled to its benefits, and so reported by a commissioner appointed for that duty by a special law; when certificates and patents had been issued to those families—whose only right could be as Mercer's colonists—and the whole procedure ratified and acted upon by the Governor, the legislature, and the Land Commissioner of the State, it seems hardly necessary to show by minute citations from the record that Mercer had a powder magazine and a depot of supplies (printed

record, page 319 at foot and 320 at top), or that the land was actually sectionized (printed record 161, q. 15), or that stakes were actually driven to mark the surveys (printed record 160, q. 7), or that cabins were built and rifles provided (printed record 165, q. 14).

It is conceived that the report of Crockett must be treated as conclusive upon the subject.

Thus it was that on 29th January, 1849, Mercer had finished his contract and became entitled to his compensation. He had done all and more than his contract demanded.

His performance was in excess of any thing that has been exacted from a colonial empressario in any adjudged case; far exceeding that of the Arredondo case or any of the more recent decisions.

He demanded his lands. Up to this day not one acre has been given to him or his associates.

It was naturally supposed by Mercer that the act of 1850, directing an investigation and report by a commissioner, was a prelude to a speedy and just settlement.

It was not to be supposed, and Mercer does not seem to have supposed, that it meant any thing but good faith. It was therefore not until after Crockett filed (on the 11th of December, 1851) his report, that delays in giving him his lands began to cause Mercer uneasiness. A year elapsed without relief being given. All of Mercer's fortune had been exhausted. He was old, poor, dispirited. He transferred to his friend George Hancock, of Kentucky, his interest and rights in the claim and the right to represent the association as chief agent and trustee.

Printed record, pages 241, 200.

Hancock at once pressed the claim before the Legislature of Texas.

The journals and documents show how the claim recognized as equitable was suffered time after time to drop between the two houses.

He employed the most eminent counsel in Texas.

Printed record, page 200.

Their opinion and actions are shown in various ways throughout the record.

Paschal has left a memorandum of what he did and thought.

Printed record, page 268.

Duval (afterward U. S. dist. judge) was retained, and has left memoranda establishing the fact and his opinion.

Printed record, page 204.

The earnestness and faithful professional zeal with which the claim was presented by Hancock and his counsel appears from Duval's letters (printed record, 113 and 114), from the receipts for fees received by lawyers from Hancock (printed record, 115), from Paschal and Duval's correspondence (printed record, 115, 116), and their receipts (printed record, 267, 268).

Meantime other compromises and adjustments of colonial contracts were made by the State—Peter's Colony, Fisher's, Castro's, and others were adjusted by legislation that was acceptable to the claimants.

The case of the Mercer's Colony was put off to the last.

Some affected to believe that there was a question whether the Mercer contract were really valid, and refused to permit the passage of a legislative measure of relief until the courts should first have passed on the validity of the grant. That point, unexpectedly no doubt to the obstructionists, and contrary to their wish, came before the Supreme Court of Texas. The case lingered for a time, and to that delay Hancock found himself bound to submit.

It was not until 1858 that the case of *Melton vs. Cobb* was decided. It will be found reported in 21 Texas.

Before, however, the legislature could be addressed again, in the light of the decision in Melton vs. Cobb, the thick-gathering storm of the civil war was upon the country. From 1860 to 1866 there was neither legislature to address nor courts to appeal to (printed record, 203). With the re-establishment of order Hancock again urged the Mercer claim upon the Legislature of Texas. Again half successful only, he failed to get a vote of both houses, and at length finding his unremitting

application fruitless, and solicitation vain, he filed the bill of complaint which is the commencement of this suit.

Since then he too has died, worn out by age and disappointment, and by bill of revivor Preston has been substituted as complainant.

That the contract of Mercer was performed in letter and spirit is believed to be shown by an uncontradicted proof. It was performed as no Spanish or colonial grant has ever, in any adjudged case, been found to have been.

Whether the case of Arredondo or the more recent decisions of this court be taken as the test, the performance of Mercer's contract will be still found to be in excess of the rule.

The standard of the Arredondo case was evidently contemplated. That case was referred to in the debates of the Texas Convention, and cited as the direct precedent.

Rusk based his argument upon it and showed how Mercer's rights and remedies were alike defined by the rights adjudged by this court to Arredondo.

Texas Debates, Constitution, page 618.

The construction given in Texas was already regulated by the decisions of this court.

XI.

But to escape the contract so shown to have been performed by Mercer, to avoid its judicially-ascertained validity, and to evade the trust so fastened, the defendant relied upon an alleged forfeiture of Mercer's rights under the colonial grant.

The answer sets up in bar of complainant's right that by a judicial proceeding in the District Court of Navarro County the colonial grant had been decreed null and void and forfeit. (Printed record, page 67.)

The record of this pretended forfeiture will be found on pages 322 to 326 of the printed record.

The absolute invalidity of these proceedings (which for convenience may be called the Navarro record), must be admitted when they are critically examined.

And as this is in reality the contention chiefly made in the lower court, it will be treated with some fullness, and with citation of authority in excess of what would otherwise be made.

By reference to the Navarro record, as contained on page 322 and following, certain defects, fatal to its admissibility, will be found:

1. It is not *authenticated* in accordance with the act of Congress, and therefore is inadmissible as evidence to prove the averred forfeiture.

   Rev. Stat. U. S. sec. 905.

2. The law of Texas, in force at that time, regulating practice in the district courts of the State, required a *statement of facts proved* whenever service was had by publication only, and the proceedings were *ex parte*.

   Paschal Dig. Laws Texas, sec. 1488.
   Hartley Dig. Laws Texas, sec. 782.

   It is needless to observe that the record shows nothing of this. The requirement is imperative, as the Texas court has held. The proceedings being *ex parte*, the strictness of the rule is enforced.

   McFadden vs. Lockhart, 7 *Texas*, 573.
   Davis vs. Davis, 24 *Texas*, 190.
   Hill vs. Baylor, 23 *Texas*, 263.

   That the statute is *imperative* and one going to the validity of the proceeding.

   Chrisman vs. Miller, 15 *Texas*, 160.

   It follows therefore that by force of the statute of Texas the alleged proceeding in Navarro County was a nullity.

3. The proceedings was by publication and *ex parte*. It was open therefore whenever offered in evidence to every objection or defense that might have been made by special demurrer, had Mercer interposed one.

   The maxim *omnia rite acta* does not apply in such a case.

Mitchell vs. Shepherd, 13 *Texas*, 484.

For this reason any and all defects of the record are brought up by the mere objection to the competency of the record as evidence.

4. The Navarro proceeding is in the name of "Albert C. Horton, *acting Governor* of the State "of Texas, and a resident and citizen of the "county of Matagorda, who *in his official capacity* "*as aforesaid* institutes this suit in behalf of *the* "*people of said State*."

Upon this there are several remarks to be made.

(*a*) There is no officer known to the law of Texas as "Acting Governor." Nor can any one, whatever his office, maintain an action for or represent "the people of the State of Texas."

(*b*) By the 4th section of article 12 of the Constitution of Texas it was provided that

"All fines, penalties, *forfeitures*, and escheats which have accrued to the Republic of Texas under the Constitution and laws shall accrue to the *State* of *Texas*."

They are not to accrue to the *Governor*, nor to any *acting Governor*, nor to *the people*, but to the sovereign corporation known as the STATE OF TEXAS, a corporation composed of the legislative and judicial, as well as the executive departments.

The State of Texas is a corporate entity. It can, like an individual, contract and bring suit.

There was not, has not been, nor is there any law of Texas authorizing suits for the benefit of the *State* (much less for the benefit of the *people*), to be brought in the name of a governor or acting governor.

On the contrary, the Articles of Annexation prescribe that the political corporation shall be called the *State of Texas*, and the Constitution of the "State of Texas" adopted that name. That

was and is the sole and only name of the sovereignty. It held lands in that name. It issued patents in that name. It contracted and sued in numerous instances in that name.

By sec. 9 of art. 4 of the Constitution of Texas it is provided that "*The style of all writs and process shall be the State of Texas,*" and that "*all prosecutions shall be carried on in the name and by the authority of the State of Texas.*"

And by sec. 2 of art. 13 of the same Constitution it is directed that "*All criminal prosecutions or penal actions which have arisen prior to the organization of the State government . . . shall be prosecuted to judgment and execution in the name of said State.*"

The statutes of Texas likewise provide that the "*style of all writs and process shall be the State of Texas.*"

Paschal Dig. sec. 1431.

So of all *capiases*.

Paschal Dig. sec. 2892.

All indictments.

Paschal Dig. sec. 2863.

And informations.

Paschal Dig. sec. 2870.

And all suits to recover *penalties* must in like manner be brought in the name of "The State."

Paschal Dig. sec. 1355.

So, too, *escheats;* the title is to be "set up by *The State* (Paschal, sec. 3663), and the judgment is "*for the State,*" and costs "*against the State,*" and "the State shall have power to proceed to "collect" the assets of escheated estates.

Paschal Dig. sec. 3666 *et seq.*

Nor, in the Constitution of 1845, or in the ordinance appended to it, is either Governor or acting Governor or "people" mentioned as em-

powered to sue, but only *The State*, and the organization of the *State* is to be awaited so that the *State* may sue.

Nor did sec. 210 of the Texas Statutes (Paschal Dig. sec. 210) provide for a suit by *Governor* or *acting Governor* or *people*, nor for one "*in behalf of the people.*" It provided only that "It shall be the duty of the attorney general of *this State* to file the petition or *information.*"

The word "information" in itself imports that the "*State*" was to be the actor; for an information is always laid in the name of the sovereign, and, as has already been remarked, all informations are by statute required to be filed in the name of the State of Texas. (Paschal Dig. 2870.) As the right of forfeiture and the title to the forfeited lands (if any) must have been in the *State of Texas* alone; and as the Constitution and laws provided for suits by the *State of Texas* and for none other, it is clear that Horton, who assumed to sue as *acting Governor* as plaintiff, had no such right. His own petition shows this in demurrable form on its face. He was a mere volunteer and his attempt futile.

This is supported by the adjudged cases.

Thus, in *Colton* vs. *United States, 11 How. 231*, which was an action of trespass, *quare clausum fregit*, it was held "Every sovereign State is of necessity a body politic or artificial person, and as such capable of making contracts and holding property. . . . . As a corporation or body politic they may bring suits to enforce their contracts or protect their property."

And in *Davis* vs. *Gray, 16 Wallace, 220*, "where the State is concerned it should be made a party, if it could be done." And again, "Making a State officer a party does not make the

State a party, though her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In the case of *The State of Texas* vs. *Delesdenier, 7 Texas, 95*, the defendant had taken wrongful possession of public lands. The *State* sued. The court of Texas said:

"Of the right of the State to appear in her own courts and prosecute suits, there can be no question; it is an incident of sovereignty not dependent upon any statute." And to the same effect may be seen *The State of Texas* vs. *Williams, 8 Texas, 384.*

It follows therefore that the action brought by A. C. Horton, acting Governor, in behalf of the people, was a proceeding not known to the law, and valueless to forfeit any right of Mercer's.

5. The State of Texas may appear by her own name, and has a right to sue, on the footing of an ordinary litigant, in her own courts in ordinary *civil* actions.

And in all actions, penal or for forfeiture, the proceeding *must* be in her own name, the rule being *structissimi juris.*

So it has been held by the Texas courts and others:

State vs. *Williams, 8 Texas,* 384.
Hall vs. *Wisconsin, 103 U. S. 15.*
State vs. *Delesdenier, 7 Texas, 95.*

In *Matthews* vs. *Offley, 3 Sumner, 115,* suit was brought against a master by a consul of the United States "*for the benefit of the United States.*" Judge Story dismissed the action, holding that it MUST be in the name of the government and not

in the name of any private (or even official) party for the benefit of the government. In the absence of statute he held that the common law would not permit such an action.

In *Bainbridge* vs. *Downs*, *6 Mass. 253*, where Commodore Bainbridge took a bond payable to himself for the benefit of the United States, it was held that an action could be maintained "only in the name of the United States."

In *Irish* vs. *Webster*, *5 Greenleaf*, *171*, it was held that a State Land Agent could not maintain suit in his own name on a note given to him in his official capacity for timber belonging to the State. The court held that "the suit should be in the name of the State."

In Ohio, where a State Superintendent of Public Roads took a note payable to himself, but "for the *benefit* of *the State*"; the court held in *Hunter* vs. *Field*, *20 Ohio*, *340*, that

"An officer of the State can not maintain a suit in his own name. * * * All contracts for money due the State should be *in the name of the State*, and all suits brought in the name of the State."

In Texas, where a county judge sued the sheriff for funds due the county and the proceeding was in the name of "*John D. McLeod, chief justice of the county of Bexar, in behalf of the said county of Bexar*," the action was dismissed, the court saying:

"The chief justice had no more right to bring "a suit in his own name for the benefit of the "county than he has to sue in his own name for "the benefit of any citizen of Bexar County upon "a note or other cause of action in which he has "no interest."

De la Gaza vs. Bexar, 31 Texas, 485.

6. It will be observed, also, that in the Navarro record there was no service upon the person of Mercer nor any seizure of the *res*.

Neither person nor subject-matter was gotten within jurisdiction, and the record was therefore a nullity.

Pennoyer vs. Neff, 95 U. S. 714.
Stegall vs. Huff, 54 Texas, 196.

7. When the petition of A. C. Horton, acting Governor, is further examined it will be noticed that there is no allegation embodied in it that Mercer and his associates were "*not inhabitants of the State*" or "*absent therefrom*" or were "*transient persons*" as required by the practice act then in force.

Hartley's Dig. sec. 676.

In the absence of such, no affidavit for citation by publication could be received.

The reports of Mercer then in possession of the State (record 167) showed that some of the associates were then actually in Texas and amenable to personal service. The affidavit for citation by publication was falsified by the public records filed in compliance with law.

8. The process act then in force, did not authorize the citation by publication, because, as was decided in *Bailey vs. Morgan, 13 Texas, 342*, by the Supreme Court of Texas, the statute

"does not authorize service of citation by *publication* on unknown nor resident defendants, not being the heirs, successors, or legal representatives of a deceased party."

Therefore the process attempted could not affect Mercer, or the Texas Association.

4 Peters, 478.
37 Texas, 444.
Paschal Dig. 6084-5.

And it results that the pretended judgment is on its face void.

5 Nevada, 90.
31 California, 353.
26 California, 153.
30 California, 610.

No presumption can cure this fatal defect.

4 Peters, 466.
45 Texas, 507.
47 Illinois, 25.
35 California, 391.
24 Iowa, 163.
2 Abbott, 542.

9. The answer charges, in reference to the Navarro proceedings (printed record, page 67), that

"Mercer and his associates, the defendants in "said suit, were *duly* and *legally* cited to appear "and answer the petition in said suit."

This is insufficient under the Texas cases. The recital in the Navarro record is "*service having been perfected and two terms of the court having elapsed since the publication.*"

Such a recital not showing time, place, manner, or other essential facts is worthless.

45 Texas, 436.
29 Texas, 150.
17 Texas, 647.
7 Texas, 483.

The return must show publication in a *newspaper*, and to say "published" is not enough.

28 Texas, 597.

The publication must be for the full time.

27 Texas, 431.
29 Texas, 150.

And in exact conformity with the statute.

45 Texas, 507.

9 Texas, 353.

10. The petition in the Navarro record avers "*that "the said contract was illegal, that it was made in violation of the Constitution of the Republic of Texas, and that it was therefore null and void from the beginning.*"

There is no charge of fraud whatever.

The Navarro record was therefore rested upon the intrinsic illegality and unconstitutionality of the colonial contract.

This is effectually disposed of by the cases of

Melton vs. Cobb, 21 Texas.

Bryan vs. Sherley, 53 Texas.

where the constitutionality, legality, and validity of the contract is sustained by the Supreme Court of the State.

11. The Navarro record is in effect, and by terms of its pretended decree, a proceeding to declare null and void *ab initio*. This excludes any idea that the judgment was based upon, or intended to be forfeited because of, non-performance of condition, or to revoke the grant therefor. Its theory is that no grant ever existed.

12. Nor can the Navarro judgment be grounded upon any real or supposed excess of quantity in the grant. There is no prayer to that effect.

And such a contention could not avail.

Burnley vs. White, 20 Howard.

13. And as to the ordinance appended to the Constitution of Texas of 1845, it may be remarked that it never was communicated, as part of the Constitution, to the Congress of the United States, as an inspection of the original draft shows, and that even regarded as part of the Constitution it can not be self-executing.

Groves vs. Slaughter, 15 Peters.

14. Forfeiture can not be had by judicial process, save in pursuance of a law authorizing and regulating the proceeding.

And in Texas there has never been a statute authorizing or regulating *forfeiture*.

So this court recently held in

Airhart vs. Messieu, 98 U. S. 491.

It is conceived that the Navarro record, so greatly relied upon by the defendant, will, when thus examined, be found insufficient to support the contention, to sustain which it is brought forward.

The theory of a forfeiture disappears and with it the only pretext for disputing Mercer's right to compensation.

It remains only to advert briefly to the relief to which the Texas Association, and Preston as its chief agent and accredited representative is entitled, and how far the administration of relief is within the power of the circuit court in its equitable jurisdiction.

For the granting of the relief prayed in the original and amended bills it will be seen that no process or act involving or complicating the State of Texas is necessary. None has been asked.

The State of Texas, if our theory of the case be correct, has already done all that is incumbent upon a sovereign State to do. By her most solemn public engagements the contract with Mercer has been recognized. Its performance by him has been accepted, and the benefit of his labor and outlay has inured to the State. The measure of his performance has been ascertained and put in the form of a legislative document in Crockett's report.

The exact quantity of land to which Mercer is entitled has been definitely and uncontrovertibly fixed.

And the State of Texas has not only thus admitted and fixed the validity of the contract, its terms, and the compensation due, but it has put in lien the public lands for the satisfaction of the claim.

There is no open question between the State of Texas and

the claimant here. No point of dispute remains between them as to the performance of the contract or the exact measure of the compensation which will discharge it. It is not necessary to call the State of Texas into court, or trench upon her sovereign immunity from suit. Her laws are ample and need but to be executed. Her officers have the power to do full justice, but they pertinaciously refuse to act. Her statute-book shows how the relief is to be given, but the Land Commissioner refuses to read or execute the law.

He has expended his ingenuity in evading the doing of right and justice, rather than in executing the plain statute before him and which the complainant cited in his bill.

And inasmuch as the points have been established,

1. That the contract is valid.
2. That a trust has been fastened on the public domain.
3. That Mercer located 1,256 colonists,

it is not difficult to administer the complete relief, through the mere official activity of the Land Commissioner of the State, especially if he be quickened in his sense of duty by the admonition of this court.

The relief asked consists wholly in certificates and patents for lands; certificates which may be located upon any vacant lands of the public domain, and patents to issue upon the located certificates, and in confirmation of the title acquired by the locator.

No new statute is necessary. Nothing remains to be done by the State.

By act of 12th August, 1870, the legislature has provided that *all colony certificates may be located and all valid colonial claims may be located outside of the limits of the respective colonies, and upon any part of the public domain.*

> See the statute set up by averment in original bill, printed record, page 8, and given in full as Appendix G hereto.

The opening of certificates and patents to those entitled is a duty devolved by express statute. The duty and the terms of

the statute are expressly averred in the bill. Th
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"The Commissioner of the Ge
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"to all persons and corporations such
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"All patents for lands emanating fro
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> "The Commissioner of the General Land "Office be and he is hereby authorized to issue "to all persons and corporations such land certifi- "cates as they may be entitled to under any "general or special law of the State."
>
> See the statute quoted in the original bill, printed record, page 9.

And a further law entitled

> "An act requiring the Commissioner of the "General Land Office to issue all patents in the "name and by the authority of the State of Texas"

provides in its 2d section that

> "All patents for lands emanating from the gov- "ernment, shall be in the name of and by the "authority of the State, and under the seal of "the State and of the General Land Office, and "shall be signed by the Governor and counter- "signed by the Commissioner of the General "Land Office."
>
> See the statute quoted in the original bill, printed record, page 9.

It is averred in the bill of complaint that it is the official duty of the Land Commissioner to execute and perform all things in behalf of the State respecting the lands in Mercer's colony.

See original bill, printed record, page 9.

And this has not only been not denied by any pleading, but has been conceded throughout the litigation.

It is seen therefore that the rights of the Mercer Colony associates can all be secured by mere ministerial action on the Land Commissioner's part.

He has but to prepare and pass through his office the certificates and patents.

True it is that the Governor's signature will be requisite to the final evidences of title. The patents issued upon located

certificates, but it is not to be presumed that there will be any refusal on the part of that officer of the State to carry out the law or do his duty.

The Governor can not act until the Land Commissioner shall first have passed the certificates. It then becomes his official duty to verify the document of title.

For this reason it has never been necessary to sue the State of Texas, nor to have further action from her political department. The State has recognized the trust, ascertained the liability through her Commissioner Crockett, and by sufficient statute has instructed her Land Commissioner to carry into effect her laws and contracts concerning public lands or colonial rights.

A mandate addressed to the Land Commissioner of Texas will solve the entire problem and accomplish the long deferred relief.

It is respectfully submitted that such a mandate is entirely proper and well within the precedents.

It will accomplish and secure a relief the justness and high equity of which can not be questioned, and it will add emphasis to the not ambiguous declarations of this court, that no wrongdoer or delinquent official will be permitted to use the State as a cover for his own neglect of duty, or to invoke the immunity of a State as a shield for his own refusal to execute the law.

It is therefore respectfully prayed that on the appeal of Walsh, Land Commissioner, the cause be affirmed, and that on the appeal of Preston further and fuller relief be directed to be given.

It is asked that by mandatory injunction the Commissioner of the General Land Office of the State of Texas, and all his successors in office, and all his and their assistants and subordinates be compelled, to issue to the complainant certificates for 1,376 sections of 640 acres of land each, to be located upon any vacant lands of the public domain of Texas.

And in like manner certificates for [illegible] sections of 640 acres of land each, to be in like manner located, on the payment first made of $12 in cash for each such section and the

surrender of $640 in audited liabilities of the Republic of Texas or the equivalent in value of the same as of 29th January, 1845 for each such section, such being the pre-emptive right under the contract, and its most valuable feature.

It is further urged as a part of complainant's just relief that these certificates be declared to be secured by the existing trust covering all the public domain of Texas and entitled to priority of issue and location, and open and free to be located upon any of the public lands at the selection of complainant.

It is also desired that the certificates be directed to be perfected into patents in the ordinary course and without delay or obstruction.

With the granting of such relief will the last unperformed obligation of the Republic of Texas be satisfied. The trust raised by the compact of two nationalities will be executed in every part. The faith pledged and again plighted will be redeemed, and justice at last be done to a claimant whose demand has been long postponed.

The State of Texas will have relieved from every lien the domain which she received at the time of her annexation to the Union. The United States will have retrieved her duty, involved in the absorption of a sister republic. The only remaining act to complete the history of Texan independence and annexation will have been accomplished.

It is sincerely believed that the facts in the record and the precedents of law warrant the prayer.

Respectfully submitted,

JOHN MASON BROWN,

Of Counsel for W. Preston.

MARCH, 1883.

APPENDIX,

CONTAINING STATUTES OF TEXAS AND DOCUMENTS REFERRED TO IN THE BRIEFS OF MR. PRESTON, MR. BROWN, AND MR. DAVIE, OF COUNSEL FOR APPELLEE.

No. 1.

ACT OF JANUARY (FEBRUARY) 4, 1841.

Hartley, p. 624.

An Act granting Land to Emigrants.

Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That every head of a family who has emigrated to this Republic, since the first of January, one thousand eight hundred and forty, or who may emigrate before the first of January, one thousand eight hundred and forty-two, with his family, and who is a free white person, shall be entitled to six hundred and forty acres of land; provided he settle and actually reside on the same for the term of three years, and cultivate an amount of the same, not less than ten acres; and further provided, he shall have his land surveyed and plainly marked, so as to include his improvements.

Sec. 2. Be it further enacted, That each single man over the age of seventeen, who has or may emigrate as provided in the first section of this act, shall be entitled to three hundred and twenty acres of land upon the same conditions and restrictions as the heads of families.

Sec. 3. Be it further enacted, That in no instance shall a patent be issued under the provisions of this act, unless the party produce the official certificate of the Chief Justice of the county where he may reside, that he, the said applicant, has proven by two respectable and creditable witnesses that he has resided on the land for which he wishes to receive a patent, and that he has cultivated the quantum of land

required by this act for the term of three years, and that he has done and performed all the duties required of other citizens, and that he has taken the oath of allegiance to this Republic; provided, always, the applicant shall be required to make oath or affirmation, that he has complied with the requisitions of this act, which oath or affirmation shall be properly authenticated.

Sec. 4. Be it further enacted, That the President of the Republic be, and he is hereby authorized, to make a contract with W. S. Peters, Daniel S. Carroll, Alexander M'Red, Rowland Gibson, Robert Espie, Wm. H. Oldmixon, Daniel Spillman, Robert Hume, John Salmon, W. Byrne, Henry Richards, Robert D. Stringer, W. C. Peters, John C. Banseman, John Peters, Wm. Scott, Phineas J Johnson, H. S. Peters, Timothy Cray, and Samuel Browning, collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the Republic, on the following conditions, to wit: the said contractors, on their part, agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract; provided, however, they shall commence the settlement within one year from the date of said contract.

Sec. 5. Be it further enacted, That the said contract shall be drawn up by the Secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution, which contract shall be signed by the President and the party or parties, and attested by the Secretary of State, who will also preserve a copy in his department.

Sec. 6. Be it further enacted, That the President shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside; provided, however, that all legal grants and surveys that may have been located within the boundaries so designated previously to the date of said contract, shall be respected, and any locations or surveys made by the contractors or their emigrants on such grants and surveys shall be null and void.

Sec. 7. Be it further enacted, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family, comprehended in said contract, nor more than three hundred and twenty acres to a single man over the age of seventeen years.

Sec. 8. Be it further enacted, That no individual contract made

between any contractor and the families or single persons which he may introduce for a portion of the land to which, respectively, they may be entitled by way of recompense for passage, expense of transportation, removal, or otherwise, shall be binding if such contract embrace more than one half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land, nor shall any emigrant be entitled to any land, or receive a title for such land until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation and under good fence at least fifteen acres on the tract which he may have received.

Sec. 9. Be it further enacted, That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them; provided, however, that this provision shall not release the colonists from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done without a sale of their land; and, further, the President may donate to every settlement of one hundred families, made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

Sec. 10. Be it further enacted, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families, and in the same ratio of half sections for every hundred single men introduced and settled, it being understood that no fractional number, less than one hundred, will be allowed any premium.

Sec. 11. Be it further enacted, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; and further, all fees incidental to the issue of patents for lands acquired under the provisions of this law, shall be paid to the Commissioner of the General Land Office for the use and benefit of the public treasury.

Sec. 12. Be it further enacted, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce, who shall be entitled to their respective quotas of land, agreeably to the provisions of this law.

Sec. 13. Be it further enacted, That the contractors shall be required to have one third of the whole number of the families and single persons for which they contract, within the limits of the Republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same, and it shall be the duty of the Secretary of State forthwith after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture, unless the President, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them for the number of families which they are bound to introduce; and this act shall take effect from and after its passage.

No. 2.

SUPPLEMENTARY ACT OF FEBRUARY 5, 1842.

Hartley, p. 645.

An Act amendatory of "An Act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one.

Article 2087. [1]. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the provisions of an act entitled "An act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one, so far as relates to the authority thereby given to the President to enter into a contract with W. S. Peters and others to introduce colonists upon certain terms therein expressed and set forth, be and the same are hereby extended to such other company, or companies, which may be organized for like purposes, as the President may in his judgment approve.

Art. 2088. [2]. Be it further enacted, That all the rights accruing to said company by the provisions of said act, and all the duties, obligations, and conditions imposed by the same upon the said W. S. Peters and his associates, be and the same are hereby extended to such other companies as may be organized under the provisions of this act.

No. 3.

ACT OF JANUARY 16, 1843.

Hartley, p. 649.

Joint Resolution to modify the provisions of an Act entitled "An Act granting Land to Emigrants.

Article 2103. Whereas, by an act passed by the Congress of Texas, entitled, "An act granting land to emigrants," and bearing date the fourth day of February, 1841, a grant was made to Daniel Joseph Carroll, Henry J. Peters, and others, their associates, therein named, for the introduction and settlement of emigrants within the territory of this Republic, and upon the terms and conditions therein provided; and whereas, by said act, the President of this Republic was authorized to make a contract with said Daniel J. Carroll, Henry J. Peters, and their associates aforesaid, collectively, in conformity with the provisions of the same; and whereas, in pursuance of such authority, the President did make a contract with the aforesaid grantees, which was duly executed in their behalf, by their attorney, Samuel Browning, and which bears date the thirtieth day of August, 1841; and whereas, the President did make a further contract with the same parties, which bears date the twentieth day of November, 1841; and whereas, the President did make a yet further contract with the same parties, through their attorney, Horace Burnham, which bears date the twenty-sixth day of July, 1842, said last two contracts being supplementary to and making one with the said first contract; and whereas, it is deemed expedient to modify some of the provisions of said act and contracts, and to extend some of the privileges therein granted; now, therefore,

Resolved, by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the President be, and he is hereby authorized and required to make such modification of the aforesaid contracts, or such further contract or contracts, with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of this Republic, and as shall not be inconsistent with the provisions of the said act:

Provided, however, That he shall have full power and authority to extend the time to the grantees named in the aforesaid act, or to

their assigns or legal representatives, for the introduction and settlement of emigrants in this Republic, to a period not exceeding five years from the first day of July next; and that he shall be authorized to prescribe the limits within which the grantees or their assigns or legal representatives shall be permitted to introduce and settle any number of families, not exceeding ten thousand, within the whole time limited; that he shall be authorized to make the title and conveyance of each section of six hundred and forty acres of land which has been or shall be acquired under any contract made or to be made, by the President of this Republic, with the grantees or their assigns, or legal representatives, to the said grantees or their assigns, or legal representatives, direct: *Provided,* That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid; and shall be required to settle or receive such lots only as are of fair quality for agricultural purposes; and not too far situated in the interior of a prairie for such purposes, whenever they shall have completed the surveys of any number of sections, and built a corresponding number of small, comfortable houses, or cabins of logs or other materials, thereon, and placed families therein, they shall receive a title from this government to one section of six hundred and forty acres for each family so introduced and settled; and shall be required to immediately convey to the legal representative of said family, not less than one hundred and sixty, nor more than six hundred and forty acres of said land: conditioned that said family shall remain upon said land so conveyed, and enclose with fence and cultivate fifteen acres, for at least three years; and in default thereof, shall forfeit the same to this Republic.

Provided, further, That in the contract to be made by the President of this Republic with the said grantees, or with their assigns, or legal representatives, they shall be required to settle each year, within the territory prescribed, or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed; and in default of introducing and settling such number of families, their contract shall be forfeited.

Provided, however, That they shall be allowed to introduce and settle any number of families, not exceeding ten thousand in all, on the same terms and conditions; and,

Provided, further, That they shall be permitted to settle all the sections within any limits prescribed, or to be prescribed, and not located previous to the time of defining such limits; and that for every alternate section of six hundred and forty acres which shall be conveyed to them, they shall pay into the treasury of this Republic twelve dollars in specie, on receiving the title from the government; and,

Provided, further, That in case of forfeiture, the party shall only be affected prospectively, any thing in the aforesaid act, or contracts, to the contrary notwithstanding:

Provided, further, That the Cherokee lands shall be exempt from the provisions of this act.

No. 6.

ACT OF JANUARY 30, 1844.

Hartley, p. 652.

An Act to repeal all laws now in force authorizing the President to form Colonization Contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with.

Article 2110. [1] Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, that all laws now in force, authorizing the President to make contracts with individuals, or companies, for the purpose of colonizing and settling portions of the unappropriated lands of the Republic, be, and the same are hereby, repealed.

Art. 2111. [2] Be it further enacted, That all such contracts, already made, the conditions of which have not been strictly and rigidly complied with, or hereafter fail to be complied with, are hereby declared forfeited; and no extension of time or privilege shall be granted to said contractors for the purposes of carrying such contracts into effect.

Art. 2112. [3] Be it further enacted, That no further contract or contracts shall be made by the President with such individuals, who have already made contracts for the purposes above specified, whereby any further time, privileges, or facilities may be granted to said contractors; and the "Joint Resolution to modify the provisions of an act entitled 'An act granting land to emigrants,' approved January

16, 1843," so far as the same relates to any prospective action of the President, in regard to modifying said contracts, or extending the time as now embraced in said contracts, whereby the privileges of said company, or their assigns or representatives, mentioned in said joint resolution, may be increased, be, and the same is hereby, repealed.

Art. 2113. [4] Be it further enacted, That it shall be the duty of the Attorney-General, under the directions of the President, to ascertain as fully as possible, all the proceedings of said contractors, how far they have complied with their conditions, and in what respects they have failed, and report fully on said subject to the next Congress of the Republic, in order that they may take such further action thereon as they may think proper.

Art. 2114. [5] Be it further enacted, That it shall be the duty of the President, whenever he ascertains that any of the colonization contracts heretofore made, have been forfeited by a failure to comply with all their provisions, on the part of the contractors, to issue his proclamation to that effect, immediately.

No. 7.

JOINT RESOLUTION OF FEBRUARY 3, 1845.

Hartley, p. 660.

Joint Resolution to establish the limits of the Mercer Colony.

Article 2145. [1] Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land actually surveyed and marked by the first day of April next.

Art. 2146. [2] Be it further resolved, That a failure to comply with the provisions of the above section, shall work a forfeiture of their contract.

Art. 2147. [3] Be it further resolved, That no person shall be recognized as provided for in said contracts, who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of land as though they had been introduced as provided for in said contract; and that this act take effect from and after its passage.

No. 8.

JOINT RESOLUTION U. S. CONGRESS, MARCH 1, 1845.

Hartley, p. 44; 5 U. S. Stat. at Large, p. 797.

Joint Resolution for annexing Texas to the United States.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports, and harbours, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provis-

ion of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery or involuntary servitude (except for crime) shall be prohibited.

3. And be it further resolved, That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the government of Texas and the United States; and that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate or by articles to be submitted to the two houses of Congress, as the President may direct.

Approved March 1, 1845.

No. 9.

JOINT RESOLUTION OF CONGRESS OF REPUBLIC OF TEXAS, JUNE 23, 1845.

Hartley, p. 46.

Joint Resolution giving the consent of the existing Government to the annexation of Texas to the United States.

Whereas, The government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State,

to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the first and second sections of the resolution of the Congress of the United States, of March 1, 1845, *supra.*]

And, whereas, By said terms, the consent of the existing government of Texas is required; therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the preamble to this joint resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May 5, 1845, and the election of deputies to sit in convention at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the government of the United States, through their accredited minister near this government, with a copy of this joint resolution; also to furnish the convention to assemble at Austin, on the fourth of July next, a copy of the same. And the same shall take effect from and after its passage.

Approved June 23, 1845.

No. 10.

ACT OF JUNE 25, 1845.

Hartley, p. 662 Arts. 2151, 2152.

An Act requiring the Commissioner of the General Land Office to issue patents in certain cases.

Art. 2151. [1] That the Commissioner of the General Land Office be, and he is hereby, authorized and required to issue patents to all persons otherwise legally entitled to the same, notwithstanding the

lands for which said patents are or may hereafter be demanded may be within the limits designated in the colonization contract made on the twenty-ninth day of January, one thousand eight hundred and forty-four, between Sam Houston, then President of the Republic of Texas, acting in behalf of the Republic, and Charles Fenton Mercer and his associates, *provided*, the locations or surveys, in pursuance of which said patents are or may be demanded, were filed in the office of county surveyor, in which said lands may be, or made by his direction, previous to notice to said surveyor of the existence and territorial limits of said contract of colonization; *provided further*, that nothing herein contained shall be so construed as to declare that any certificate located within any colony limits, is not as valid as if located upon any of the vacant domain of the Republic.

Art. 2152. [2] The official certificate or certificates of said surveyor or surveyors, shall be sufficient evidence to the Commissioner of the General Land Office of the receipt of said information or notice by said surveyor or surveyors, in the first section of this act mentioned.

"AN ORDINANCE."

"Whereas, various contracts have been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas; and

"Whereas, it is believed that said contracts were unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upwards of seven millions of acres of the public domain of Texas, in the hands of a few individuals—when, in truth, the citizen soldiers and creditors of the Republic of Texas, had, by the laws and constitution of said Republic, a clear and indisputable previously subsisting right to locate upon the public domain thus attempted to be assigned to said contractors:

"Sec. 1. Therefore it is hereby ordained and declared, That it shall be the duty of the attorney general of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas; and if upon such

investigation, it shall be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void; provided, however, that all actual settlers under any such contract shall be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And in all suits brought by or against any contractors, or any person claiming under, by, or through them, or either of them, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead; and the party may introduce testimony to prove the claim or title to have been forfeited, as well for frauds, or illegality, or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas shall be deemed good and valid in law, in all such suit or suits in this State.

"Sec. 2. Be it further ordained, that the legislature is hereby restrained from extending any contract for settling a colony, and from relieving any contractor from the failure of the conditions, or the forfeiture accruing from non-compliance with the contract.

"Sec. 3. And be it further enacted, That this ordinance shall be presented to the people for their adoption or rejection, at the same time that this constitution shall be presented to them, and the returns of the votes taken on this ordinance shall be made to the office of the Secretary of State of the Republic of Texas, at the same time the votes for the constitution may be returned.

"Adopted in convention, this twenty-seventh day of August, one thousand eight hundred and forty-five.

"Attest: "THOS. J. RUSK, *President.*

"JAMES H. RAYMOND,

"*Secretary of the Convention.*"

No. 14.

ACT OF MAY 11, 1846.

Hartley, p. 104.

An Act defining the duties of the Attorney General of the State of Texas.

Art. 77. [13] *Be it further enacted,* That it shall be the duty of the Attorney General of this State to file the petition or information, and

institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate.

No. 15.

ACT OF FEBRUARY 2, 1850.

Hartley, p. 702.

An Act for the relief of the citizens of Mercer's Colony.

Art. 2309. [1] *Be it enacted by the Legislature of the State of Texas*, That every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the twenty-fifth of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit, six hundred and forty acres to each family, and three hundred and twenty acres to each single man over the age of seventeen years; *provided*, that nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.

Art. 2310. [2] That the Governor, by and with the advice and consent of the Senate, shall appoint a commissioner, whose duty it shall be to hear proof and determine what colonists shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such parties, certificates for their proper quantity of land.

Art. 2311. [3] That the owners of said certificates may locate, transfer, or donate the same, and exercise all rights of ownership over them.

Art. 2312. [4] That said certificates may be located on any vacant land within the limits of said colony not otherwise appropriated, as other headright certificates are located; and the same laws relative thereto shall govern the surveyors and other officers in the discharge of their official duties in relation to the surveying, recording, etc., of the same.

Art. 2313. [5] That no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent

of the contractors, so that the boundaries thereof are justly and definitely marked.

Art. 2314. [6] That should the commissioner appointed under the second section of this act fail or neglect to act, or should the office in any manner become vacant, the Governor is hereby authorized and required to fill such vacancy by appointing some competent person to perform the duties herein required as soon as practicable.

Art. 2315. [7] That the commissioner appointed in compliance with this act shall receive two dollars for each certificate issued, to be paid by the party receiving the same; and said commissioner shall do and transact the business and duties required of him at the different county seats of each and every county within the limits of said colony.

Art. 2316. [8] That to entitle the colonists to the benefits of this act, they shall be required to prove by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to the twenty-fifth of October, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither; *provided*, that they shall not be required to prove that they have cultivated land.

Art. 2317. [9] That to entitle the heirs and legal representatives of such citizens as have died subsequently to their citizenship, within the limits of said colony, to the benefits of this act, the proof and requirements shall be the same as in the foregoing, except the oath; instead of which there shall be substituted the oath of the heirs and legal representatives of such citizens, testifying to the best of their knowledge and belief to the truth of the facts herein required to be proven.

Art. 2318. [10] That upon the presentation of said certificate, with the proper field-notes of the surveyor, made in accordance with the law, the Commissioner of the General Land Office shall issue the patents accordingly, to all who may be entitled to the same.

Art. 2319. [11] That it shall be the duty of the commissioner appointed by virtue of this act, to send to the Commissioner of the General Land Office, a monthly list, under oath, containing a description of certificates issued in compliance with this act; and he shall also keep a record in a well-bound book, showing the quantity of land

for which each certificate issued, the names of the parties obtaining the same, and the names of the witnesses who made the proof; and said commissioner shall deposit said record-book in the General Land Office, at the expiration of the time limited in this act for granting certificates.

Art. 2320. [12] That the commissioner appointed by virtue of this act, before he enters upon the duties of his office, shall give bond in the sum of twenty thousand dollars, with security to be approved by the district judge of the ninth judicial district, which bond shall be drawn payable to the State of Texas, and shall be conditioned that the commissioner shall faithfully and impartially discharge the duties imposed on him by this act; and shall also take the oath required by the Constitution, which oath shall be endorsed on the said bond, and with the same shall be deposited in the office of the Secretary of State.

Art. 2321. [13] That said commissioner shall continue to perform the duties imposed on him by this act for and during the term of eighteen months from and after his appointment as aforesaid, and no longer.

Art. 2322. [14] That in case the claim of any individual be rejected by said commissioner, such claimant shall have the right to appeal to the District Court of the county where he or she applied, under the rules and regulations governing appeals from Justices' Courts to the District Courts, except that the appeal-bond be required only to cover the costs of appeal; and in case the judgment be affirmed, the appellant shall pay all costs; and in case the judgment be reversed, the claimant shall be entitled to a certificate from the clerk of the District Court, for which he shall pay to the clerk of the court two dollars; which certificate shall entitle the owner to all the right to which he would have been entitled under a certificate from the commissioner aforesaid.

No. 16.

ACT OF CONGRESS U. S., SEPTEMBER 9, 1850.

U. S. Statutes, p. 446.

An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a Territorial Government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas: *Provided*, The said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreeement.

Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the

end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Fifth. Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided,* That nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March 1, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise.

No. 17.

ACT OF NOVEMBER 25, 1850.

Paschal's Digest, p. 193.

An Act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by her Exterior to said Boundaries and of all her Claims upon the United States, and to Establish a Territorial Government for New Mexico."

Article 443. Whereas, said propositions are contained in the first section of said act in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States

and upon the said State of Texas: *Provided*, The said agreement by the said General Assembly shall be given on or before the first day of December, eighteen hundred and fifty:

Art. 444. [1] The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of North latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Art. 445. [2] The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Art. 446. [3] The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Art 447. [4] The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Art. 448. [5] Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided*, That

nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise; therefore,

Art. 449. [1] That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

Art. 450. [2] That the Governor of this State be, and he is hereby requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress.

No. 18.

ACT OF JANUARY 24, 1852.

Pamphlet Laws, Chapter lxv., p. 35.

An Act for the Relief of the Settlers in the Territory commonly known as Mercer's Colony.

Section 1. Be it enacted by the Legislature of the state of Texas, that the Commissioner of the General Land Office is hereby required to issue patents upon all surveys made by virtue of certificates issued to settlers as colonists in the territory commonly known as Mercer's Colony, under the same terms and conditions as required by law in other cases; *provided*, that no such certificate shall be located without the limits of the territory generally known as Mercer's Colony, prior to the rendition of the decree of twenty-eighth day of October, A. D. eighteen hundred and forty-eight, by the District Court of Navarro county; *provided*, that nothing contained in this act shall be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract or rights growing out of the same.

Art. 2. That this act shall take effect from its passage.

Approved January 24, 1852.

No. 19.

ACT OF FEBRUARY 16, 1852.

Pamphlet Laws, p. 136.

An Act Supplementary to and Amending an Act for the Relief of Citizens of Mercer's Colony, of date February 2, 1850.

Section 1. *Be it enacted by the Legislature of the State of Texas,* That section eight of the above recited act be so amended that it shall only be necessary for the colonists applying for lands to prove that they were resident citizens of said colony January 29, 1849, but in all other respects they shall fully comply with the provisions of said eighth section of said act.

Sec. 2. That the proof required by the first section of this act shall be made before the district court of the county in which the party resided January 29, 1849; and it shall be the duty of the district court to hear and determine, and award or refuse certificates to the parties applying under the provisions of this act, and the act to which this act is supplementary, in the same manner as the commissioner appointed under said act might or should have done under the same.

Sec. 3. That no petition shall be required, and it shall only be necessary for the clerk of said court, upon the application of the party desiring to avail himself of the provisions of this act, to enter the name on the applicant on his docket, and the said application shall be heard in its order as other cases upon the docket, unless the court shall appoint some particular day of the term for hearing the same.

Sec. 4. That the certificates for the claims established under this act shall be issued by the clerk and be countersigned by the judge of the court issuing the same, and of the issues of said certificates the clerk shall make monthly returns to the Commissioner of the General Land Office; in no case shall the clerk's fees be more than three dollars, and he shall be entitled to said fees from the applicant should he fail or succeed in his application.

Sec. 5. That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March 23, 1850, shall apply and be of force in regard to all rights sought to be established, and all certificates issued under the provisions of this act, except in the amendment

provided for by the first section of this act; *provided*, not more than twenty certificates shall be proven up.

Sec. 6. That this act take effect from and after its passage.

Approved February 16, 1852.

No. 20.

ACT OF JANUARY 21, 1854.

Pamphlet Laws, p. 9.

An Act supplementary to An Act supplementary to and amending "An Act for the relief of the citizens of Mercer's Colony," of date February second eighteen hundred and fifty.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March twenty-third, eighteen hundred and fifty, shall apply and be in force in regard to all rights sought to be established, and all certificates issued under the provisions of the act to which this is a supplement, *provided*, that no certificate shall be granted or issued under the provisions of this act, or the act to which this is a supplement, unless the applicant shall make all the proof required by the above recited act, and shall also prove, by his or her own oath, supported by the oath of two respectable witnesses, that he, or his or her ancestors or decedents, as the case may be, emigrated to and settled with the limits of the territory commonly known as Mercer's Colony, on or before the twenty-ninth day of January, A. D. eighteen hundred and forty-ninth; and should any certificate be obtained by fraud or perjury, or otherwise than according to the true intent and meaning of this act, such certificate, and the patent issued thereon, shall be utterly void.

Sec. 2. That the fifth section of an act supplementary to and amending an act for the relief of the citizens of Mercer's Colony, of date sixteenth of February, eighteen hundred and fifty-two, be and the same is hereby repealed; and that this act take effect from and after its passage.

Approved January 21, 1854.

No. 21.

ACT OF DECEMBER 17, 1857.

Pamphlet Laws, p. 21.

An Act to repeal an Act supplementary to an Act for the Relief of the Citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856.

Section 1. Be it enacted by the Legislature of the State of Texas, That an act supplementary to an act for the relief of the citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856, be and the same is hereby repealed; *provided*, that the passage of this act shall not in any way affect the right of parties who have received certificates for land from any district court under the provisions of the act hereby repealed.

Sec. 2. That this act take effect and be in force from and after its passage.

Approved December 17, 1857.

ACT OF FEBRUARY 28, 1855.

U. S. Statutes, vol. 10, chap. 129, p. 617.

An Act to provide for the Payment of such Creditors of the late Republic of Texas as are comprehended in the Act of Congress of September nine, eighteen hundred and fifty.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That in lieu of the sum of five millions of dollars, payable to the State of Texas, in five per cent. stock of the United States, by the act entitled "An act proposing to the State of Texas the establishment of her Northern and Western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico," passed September ninth, eighteen hundred and fifty, the issuing of which stock was restricted by the first proviso to the fifth proposition contained in the first section of said act, the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the creditors of the late Republic of Texas, who hold such bonds, or other evidences of debt for which the revenues of

that Republic were pledged, as were reported to be within the provisions of the said act of September the ninth, eighteen hundred and fifty, by the report of the late Secretary of the Treasury to the President of the United States, and approved by him on the thirteenth day of September, eighteen hundred and fifty-one, or which come within the provisions of said act, according to the opinion upon the Texas compact of the present Attorney General of the United States, addressed to the Secretary of the Treasury, under date of September twenty-sixth, eighteen hundred and fifty-three, the sum of seven millions seven hundred and fifty thousand dollars, to be apportioned among the said holders pro rata: *Provided*, That the interest on the debt, embraced in this act, shall be determined by the existing laws of the State of Texas.

Sec. 2. And be it further enacted, That in all cases where the State of Texas may have paid any portion of the debt described in this act, the said secretary shall refund to the proper officer of said State the amount actually so paid by the State, upon the presentation at the Treasury Department of the evidences of said debt, on which the said State may have made such payment: *Provided*, The said sum shall not exceed the proportion which would have been allowed to the creditor or creditors, if such payment on said evidences of debt had not been made by the State of Texas; and where the said sum that may be refunded to the State of Texas by the provisions of this section is less than the proportion which would have been allowed under this act to the holders of such evidences of debt, had such payment not been made them, such holders shall be entitled to receive the difference between said sum and the proportion they would have received under this act if no payment had been made them; and where any original certificates or other evidences of debt have been surrendered to the authority of the State of Texas, and new certificates issued therefor by said State of Texas, such new certificates shall be received as evidences of the original amount of the claim.

Sec. 3. And be it further enacted, That no payment shall be made under this act, to any holder of said securities, or evidences of debt, unless the said holder shall first execute to the United States a receipt for the said payment, in which said holder shall forever release all claim against the United States for or on account of the said securities, or evidences of debt; also, similar releases to said State of Texas; and the said certificates, or other evidences of debt, shall then be deposited with the Treasury Department.

Sec. 4. And be it further enacted, That before payment of the moneys aforesaid, the Secretary of the Treasury shall give notice, by public advertisement, for the space of ninety days, of the time at which said payment will be made; and no payment shall be made on any bond, certificate, or evidence of debt, which shall not, thirty days before the time limited by said notice, be presented at the Treasury Department.

Sec. 5. And be it further enacted, That the sum of seven millions seven hundred and fifty thousand dollars be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, for the purpose of carrying into effect the provisions of this act.

Sec. 6. And be it further enacted, That this act shall not take effect until it shall be assented to by an act of the legislature of the State of Texas, and a copy of the act of said State, duly authenticated, deposited in the Treasury Department at Washington, nor until the legislature of the State of Texas shall pass an act withdrawing and abandoning all claims and demands against the United States, growing out of Indian depredations or otherwise.

Approved, February 28, 1855.

"G."

ACT AUGUST 12, 1870.

2 Paschal's Digest Statutes, p. 1443.

Section 5. "The holder of any genuine land certificate, or other valid land claims against the State of Texas, shall hereafter have the right to locate the same upon any part of the public domain of the State not subject to the claim of actual occupants, as prescribed in the foregoing sections of this act, and in accordance with the laws now in force in reference to the location, surveying, and patenting of lands in this State; *provided*, that all such certificates shall be located, surveyed, and returned to the general land office by the first day of January, eighteen hundred and seventy-five, or be forever barred.

G. 1.

ACT OF MAY 16, 1871.

2 Paschal's Digest Statutes, p. 1443

Section 3. Section five of the aforesaid act, approved August 12, 1870 [shall] be so amended as to read in the following words, to wit: The holder of any genuine land certificate or other valid land claim against the State, including railroad and colony certificates, and all other certificates that have not been declared void by some competent authority, shall have the right to locate the same on any part of the public domain of the State, not included in any railroad reservation, nor in any State section of land surveyed by virtue of any railroad certificate, nor upon any island, and not subject to the claims of actual occupants, and have the same surveyed and patented in accordance with existing laws; *provided*, that all such certificates and land claims shall be located, surveyed, and returned to the general land office by or before the first day of January, A. D. eighteen hundred and seventy-five, or be forever barred.

OFFICE SUPREME COURT U. S.
FILED
MAR 5 1883
JAMES H. McKENNEY, Clerk.

109-297

Supreme Court United States.

OCTOBER TERM, 1882.

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, ... Appellant,

VERSUS

WILLIAM PRESTON, ... Appellee,

No. 863.

AND

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, ... Appellee.

ARGUMENT OF GEO. M. DAVIE FOR WM. PRESTON.

COURIER-JOURNAL JOB-ROOMS PRINT.

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WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellant,

VERSUS

WILLIAM PRESTON, ... Appellee,

No. 863.

AND

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellee.

No. 864.

ARGUMENT OF GEO. M. DAVIE FOR WM. PRESTON.

Statement of the Case.

The plan of colonization contracts was adopted at an early date for the settlement of America. Vast bodies of unexplored lands were granted by the different European sovereigns to adventurous contractors, in consideration of services to be rendered in the introduction of settlers. This plan was adopted alike by the English, the French, the Dutch, and the Spaniards. Thus, Jamestown was settled by colonists introduced by the "London Company;" and the grant to Wm. Penn, of the province of Pennsylvania, and that to Lord Baltimore, of the province of Maryland, for colonization, will be

found set forth in the great suit of Penn vs. Lord Baltimore, 1 Vesey, sr. 444.

In the Spanish-American possessions this system of large grants to colony contractors was almost the only mode of settlement.

The celebrated "Arredondo" case (6 Peters, 745) is an example of such a grant in Florida; a large body of land being there set apart to a colony contractor, upon which he contracted to settle "two hundred Spanish families."

Similar grants to colony contractors were frequent, also, in Mexico, and the other Spanish provinces.

Texas was settled, in a great measure, through the means of colony contractors.

The Empire of Mexico had a general system of laws under which "*empressarios*," or colony contractors, could obtain large bodies of land in any unsettled portion of Texas, to be used in the settlement of colonists. (See these laws collected in 1 Paschal's Digest of Texas Statutes, pages 206 to 230.)

Stephen Austin, the father of Texan Independence, and whose name the capitol of Texas now bears, was a "colony contractor" on a large scale. (See 1 Paschal's Digest of Statutes of Texas, pages 153, 154.)

When Texas became a Republic, in 1836, the same system was continued. (See the "Colonization" laws of the Republic, collected in 1 Paschal's Digest of Statutes of Texas, pages 231 to 254.)

At that time the Territory of Texas embraced 379,319 square miles, or 254,284,160 acres. This was greater than the area of all the Atlantic States from Maine to Georgia; over three times the size of Great Britain and Ireland, and over nine times the size of the State of New York. The greater portion of this vast domain was well nigh unexplored, was subject to Indian forays, and was almost valueless. The only hope of the young Republic was to induce emigrants to come in and fill up its vacant lands, and thus to render them valuable; so as to produce revenue in taxation, and so as to afford a population for defense against the Mexicans and Indians.

As was said by this court, with respect to similar lands in California:

"The millions of acres around them, with the exception of a mission or rancho on some favored spot, were uninhabited and uncul-

tivated. It was the interest and policy of the King of Spain, and afterward of the Mexican government, to make liberal grants of these lands to those who engage to colonize and settle upon them. . . . Under such circumstances land was not estimated by acres or arpents. A square league (about 4,400 acres) appears to have been the only unit in estimating the superficies of land. . . . Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a map showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges. The distances between these monuments were often estimated at 'about' so many leagues; and fractions of this unit were little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear as rather vague and uncertain boundaries. But, where land had no value, and the unit of measurement was a league, such monuments were considered sufficiently certain. Since this country has become a part of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as enormous 'monopolies' 'princedoms' etc.; and this court have been urged to deny to the grantees what it is assumed the former governments have too liberally and lavishly granted." (U. S. vs. Sutherland, 19 Howard, 364.)

"The public lands of the provisional government (of Texas) were bestowed very freely. . . . This seemed very liberal, but the cash value bestowed was very small. . . . The charges of the Mexican government for a league of land were less than four cents an acre. . . . After they got their titles they found they had to pay $12 for *surveying* 640 acres, and $1 for the record. . . . The result was that land was at a very low price or at no price." (Gouge's Financial History of Texas, pages 27, 28.)

It was very certain that unless immigration could be speedily and largely encouraged Texas would break down financially, or would be reconquered by the Mexicans and Indians.

Accordingly, and continuing the former policy of colonization under which those who then formed the government of Texas had mostly been themselves introduced into the country, the Texas Congress passed a system of colonization laws.

By the acts of that Congress of February 4, 1841, February 5,

1842, and the joint resolution of January 16, 1843, the President of the Republic (General Sam Houston), was authorized and empowered to make colonization contracts for unlimited amounts of land with such colony contractors as he might in his judgment deem proper. (See these acts in 1 Paschal's Digest of Texas Statutes, pages 234, 235.)

In pursuance of these acts, and of the policy which they were intended to carry out, the Presidents (Houston and Lamar) entered into thirteen colony contracts, with different colony contractors. By each of these contracts, a specified portion of the vacant public lands out upon the remote and unsettled frontiers, was described, was detached from the public domain, and was set apart and appropriated to the purposes of the colonization contract.

One of these contracts was with General Charles Fenton Mercer and his associates.

The body of land described in the Mercer contract and set apart and appropriated for the purposes thereof, is situated near where is now the town of Dallas. The full boundaries of the tract, thenceforth universally recognized and known in Texas as "Mercer's Colony," will be found set forth, under the title of "Mercer's Colony," in article 261 of Paschal's Digest of Texas Statutes, vol. 1, page 156. It contained about 6,098 square miles or over 4,000,000 acres.

Some of the other colony contracts were much larger; that known as the "Peters' Colony," for example, containing 16,000 square miles.

These various colony contracts and boundaries were so well known and recognized that the Supreme Court of Texas said of them that they:

. . . "have been too often judicially ascertained and are too notorious to require at this day to be established by formal proofs. They are facts which have become a part of the history of the country, and are matters of judicial cognizance." (Hatch vs. Dunn, 11 Texas, 715.)

The material provisions of the contract were these:

1. The Republic thereby detached and set apart from the public domain all the lands within the boundaries of said "colony grant;" and agreed to hold the legal title thereto in trust "for the benefit of

the party of the second part" (Mercer), for the purposes of the said contract.

2. The Republic agreed to "give, grant, and convey" to Mercer and his associates one square mile, or 640 acres, for each family that might be introduced, within five years, to settle within the reserved boundaries.

3. The Republic further agreed to give, grant, and convey to Mercer and his associates, as a further compensation, and as a premium, ten sections, of 640 acres, for each and every 100 families induced to settle as aforesaid.

4. The Republic further agreed to give to said Mercer and his associates the "full and absolute title" to an equal amount of the residue of the land within those colony boundaries not absorbed as above, upon the payment by them to the Republic of twelve dollars, and the delivery up by them for cancellation of $640 in bonds, notes, and other liabilities of the Republic.

5. The Republic agreed to hold the said territory embraced in Mercer's Colony free from the settlement or claim of any other person or persons until the rights of Mercer and his associates under the colonization contract were fully settled.

6. Mercer and his associates agreed that there should be introduced and settled within those boundaries at least 100 families prior to the 1st day of May, 1845, and at least 150 families during each of the succeeding four years.

7. In the event that Mercer and his associates should fail to introduce at least 100 families during the first year, and at least 150 families during any other succeeding year, the right and title of Mercer and his associates to 'proceed *further*' in the execution of the contract was to 'cease and determine' from the moment of such default, but such default was 'not to operate retrospectively,' but was to 'leave to Mercer and his associates, and persons claiming under them whatever right, title, or interest they may have acquired prior to such default, the same as if no such default or failure had occurred.' (See the Contract, in the record, pages 91 to 100.)

This contract was executed by the President of the Republic, and by Mercer, in due form; and was duly recorded and filed among the archives of the Republic of Texas. The Supreme Court of Texas have decided, in Melton vs. Cobb, 21 Texas, 530, that this contract was lawful, valid, and created vested rights; and that

the question of its validity must be considered as forever 'set at rest.'

Gen. Mercer and his associates organized an unincorporated company known as "The Texas Association;" of which Gen. Mercer was the trustee. The trusteeship afterward, in 1852, devolved upon Col. George Hancock, and, upon his death, in 1875, upon the complainant, William Preston.

The words of the contract were:

"*All* lands lying within the boundaries hereinafter described . . . shall *remain* and be *held* subject to be settled in manner aforesaid by the party of the second part." (Record, 92.) And further:

"The unlocated lands included in the following boundaries shall remain and be held by the government of this Republic for this purposes herein set forth until the end of five years from the date hereof, and shall be considered as *set apart exclusively of all future claims, to be colonized* in the manner aforesaid, by and *for the benefit of the party of the second part* aforesaid, and of this Republic." (Record, 98.) And further:

"And the said party of the first part further covenants and agrees, in behalf of the Republic, to give, grant, and convey to the said *party of the second part and associates*, or their legal representatives, one section of 640 acres of land for each family, or two half sections of 320 acres for each and every family, which they shall introduce and settle upon the lands hereinafter described and set apart for colonization." (Record, 93.)

And further, upon the payment of $12.00 in money and $640.00 in Texas scrip, the "*second party* or their legal representatives shall be entitled to demand, and shall receive from the government a full and absolute title to 640 acres of the alternate sections reserved" to the extent of the number of families introduced.

This created a clear reservation appropriation and trust as to the lands in Mercer's Colony. It created a vested right, *in presenti*, in Mercer and his associates.

In Wilcox vs. Jackson, 13 Peters, 498, it is said, "We go further and say that whenever a tract of land shall have been once legally *appropriated* to any purpose, from that moment the land thus appropriated becomes *severed from* the mass of public lands; and that no

subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no other reservation were made of it."

In State vs. Deledesnier, 7 Texas, 108, it was held that where a body of public lands was appropriated to any purpose, they must be considered as "severed from the public domain" and as having "lost the character of public lands."

These cases are quoted approvingly in Leavenworth R. R. vs. U. S.; 2 Otto, 741-745, where the same doctrine was affirmed.

Almost from the very beginning of this court it has been held that "a grant for a certain quantity of land by the Government, to be *afterward surveyed and laid off within a certain Territory*, vests in the grantee a *present and immediate* interest."

Fremont vs. United States, 17 Howard, 559;
Rutherford vs. Green, 2 Wheaton, 196;
U. S. vs. Hornsby, 10 Wallace, 233.

In analogous cases of railway grants, it is held that they are grants *in presenti*, and that, "When such location and appropriation were made, the title which was previously imperfect, acquired precision and, *by relation*, took effect *as of the date of the grant.*"

Railway Co. vs. Alling, 99 U. S. 475;
Wood vs. Railroad Co. 104 U. S. 332;
Mo. R. R. vs. Kan. R. R. 97 U. S. 497;
Leavenworth vs. R. R. 92 U. S. 741.

"The title passed to the sections, to be afterward located."

Schulenberg vs. Harriman, 21 Wallace, 60.

"They vest a *present title* in the State of Kansas; though a survey of the lands and a location of the road are necessary to give *precision* to it, and attach it to any particular tract. The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specially described them."

Leavenworth v. U. S. 2 Otto, 741.

Mercer and his associates proceeded immediately to the work of inducing colonists to settle within the said boundaries. With this idea, they immediately had an accurate survey made of the boundaries of the colony grant, and had over a thousand maps thereof lithographed and distributed over America and in Europe. They had the attractions of Texas and of the colony lands advertised in many newspapers throughout the United States. General Mercer

traveled over many parts of the United States and visited Europe several times, stirring up emigration. The result was, the settlement of at least 119 families within the boundaries of the contract the first year; the names and residences of whom are given in one of General Mercer's official reports to the State of Texas; which report will be found on pages 102–4 of the record. He continued vigorously at work during the succeeding years, notwithstanding the many difficulties and obstructions thrown in his way; with the result that, by the 28th of October, 1848, there had been settled within his colony boundaries certainly at least 1,256 families. The period within which he had the right to bring settlers within the colony boundaries was not to expire until January 29, 1849. How many more families than these were settled within those extensive boundaries, and how many more would have been settled there but for the obstructions (hereafter referred to) which were thrown in his way, can only be estimated. The refusal of the defendant herein to give in his answer the list of persons who received grants of land within that boundary renders the record incomplete on this point.

This performance of this contract by Mercer was at great expense to him and his associates. The record shows the expenditure of over twenty thousand dollars, and it must have cost much more. It was, besides, at the cost of the labor and risks of four years of his life; in an unsettled country, among a people almost beyond the pale of law, and amidst all the discouragements of hostile legislation, and official interference.

Under the terms of the contract, Mercer and his associates therefore became and were entitled as follows:

1. They became the equitable owners and entitled to receive the legal title to 1,376 square miles of said lands; being one square mile of 640 acres for each of the 1,256 families introduced and 120 square miles more as "premiums."

2. They became the equitable owners of, entitled to receive the legal title to, 1,376 additional square miles of said lands, upon payment by them of $12 in money and $640 in Texas scrip per square mile.

But, during the second year of the contract, Texas determined to enter into the American Union, and this was accomplished in the latter part of 1845.

By the terms of its annexation, as we shall hereafter see, *all* of the vacant and unappropriated lands lying within the State, were pledged for and charged with the payment of the debts and liabilities of the Republic; and thus became pledged for the liability of the State to perform this contract. (See the Articles of Annexation, 1 Paschal's Digest of Texas Statutes, pages 44–5.)

Immediately upon its admission, a change of 'policy' took place. Obtaining thereby the powerful protection of the United States, Texas considered that it no longer needed the emigration it had formerly deemed so essential. And besides, by that time, the strong current of emigration turned into the State by the efforts of the various colony contractors, had already erected a protecting barrier along the frontier.

Then began a system of legislative and official interference, obstruction, and violation of the contracts, which forms the darkest chapter in the history of the State.

When the five years of the contract had expired, January 29, 1849, General Mercer and his associates were unable to obtain, and they have never obtained, one acre of the large body of the lands to which they were and are entitled; or any compensation therefor.

By the force of a better public sentiment, or other means, the other twelve colony contractors have from time to time obtained adjustments and satisfaction of their dues from the State of Texas. That of Mercer alone remains unsatisfied; and this too without any reason and without any excuse.

From the time, when by the terms or their contract they were entitled to do so, Mercer and those who claim under him have persistently and urgently sought relief at the hands of the State of Texas. They have petitioned its legislatures from time to time for the privilege to sue the State, and to thereby settle their rights. This has been refused them; without reason. At one time, the measure would pass one house of the Texas Legislature; only to be suppressed in the other. No reason was ever given for refusing them relief, that would stand for a moment in any court of justice. Their inability to sue their trustee, the State of Texas, forced them to wait, hoping for justice, through years that have since elapsed.

In 1858 the Supreme Court of the State of Texas, in the case of Melton vs. Cobb, 21 Texas, 539, in which the matter came up in a suit between a colonist under Mercer and a subsequent patentee,

put at rest the pretensions of unconstitutionality that had been urged against the grant to Mercer. It was hoped by the Texas Association, that, that pretense having been thus brushed aside, justice would at last be done them; but soon after, the civil war came on, and, after that, the reconstruction measures; and the lawlessness and sympathy toward repudiation of obligations, which arose out of the disorganization of the civil war. In 1873, as soon as there seemed to be any hope, the Texas Association again applied to the legislature, petitioning for relief. They were again put off. In the meantime, the successive Commissioners of the Land Office of Texas had been issuing patents to strangers, upon the land within the boundaries of the trust property; until the whole was threatened to be thus clouded with antagonizing claims. The protests of the Texas Association being unheeded, on the 6th day of March, 1875, the trustee of the Texas Association filed this bill in equity in the United States Circuit Court at Austin, Texas, against the Commissioner of the Land Office, which was afterward amended. The original and amended bills set forth substantially the foregoing facts, and prayed that Walsh be enjoined from issuing any other certificates or patents to lands within the boundary, or otherwise wasting the trust-estate, and also that he be prohibited from issuing any other certificates or patents for land on any of the public lands of Texas which are vacant and unappropriated; and further praying that, upon final hearing, the said defendant as Land Commissioner be compelled to issue to the complainant certificates and patents for 1,376 square miles of land within said colony boundaries, or its equivalent in value elsewhere; and also for 1,376 additional square miles in said boundary, or its equivalent in value elsewhere, upon the payment by the Texas Association of $12 in money and an amount equal to the value in 1844 of $640 of Texas scrip, for each square mile.

The defendant demurred to the petition; but his demurrer was overruled by Judge Woods; whose very full opinion will be found under the style of Hancock vs. Walsh, in 3 Woods's Reports, 351.

The defendant then answered; full proof was taken on each side; and a final decree was rendered by Judge Pardee on January 26, 1882. (See his opinion in 10 Federal Reporter, 315.)

Judge Pardee decreed:

1. "That the complainant's allegations are found to be true and supported by the proof;" that is to say, that the complainant is

entitled to the original 1,376 square miles of land; and also to the other 1,376 square miles, upon his paying $12 and the value of $640 in old Texas scrip per square mile.

2. That a perpetual injunction go against defendant and his agents and employees restraining them from wasting or clouding the trust property by issuing any certificates or patents or other documents of title for lands, in the boundaries of Mercer's Colony, to any person whose alleged rights are subsequent to the date of the Mercer contract of January 29, 1844.

The defendant Walsh appeals from that decree, and claims that it is erroneous for, in substance, the following reasons:

1. That the United States Circuit Court had no jurisdiction of the case; because it is in effect a suit against the State of Texas.

2. That the said colonization contract of January 29, 1844, was void for unconstitutionality, and for fraud on the part of President Sam. Houston in making it.

3. That it is not proved that Mercer and his associates induced 1,256 families to settle in said colony.

4. That the said colony contract was *forfeited* by reason of a failure of Mercer to perform his covenants thereunder.

5. That the said colony contract was *forfeited* by subsequent legislation, or a constitutional ordinance, of Texas.

6. That the said colony contract was canceled and annulled by a judgment, rendered October 28, 1848, in a certain suit in Navarro County, Texas, styled A. C. Horton, Acting Governor, vs. C. F. Mercer and his unknown associates.

7. That the claim of complainant is barred by the statute of limitations and the lapse of time.

The complainant, Preston, appeals from that decree, and claims that it is erroneous in not extending further relief, in the following ways:

1. The court having adjudged that by force of the Articles of Annexation of Texas to the United States "all the vacant and unappropriated lands" of Texas, *outside* of the Mercer Colony boundaries, were pledged for and charged with and "to be applied to, the payment and discharge" of the liabilities of the Republic, including its liability under the Mercer contract; the court should have so

enlarged and extended its injunction as to prohibit the defendant from issuing certificates or patents to others upon any of said vacant and unappropriated lands, *outside* of Mercer's Colony boundaries, until the said liabilities of the Republic, under said contract, are satisfied and discharged.

2. The court should, by a mandatory injunction, have forbidden defendant to further withhold from complainant certificates and patents for 1,376 sections of land in Mercer's Colony; or its equivalent in value elsewhere.

3. The court should, by its mandatory injunction, have forbidden defendant to further withhold from complainant certificates and patents for 1,376 additional sections in Mercer's Colony, or its equivalent in value elsewhere, upon complainant paying $12 in money, and $640 in Texas scrip, or its value in 1844, per section.

It is proposed first to consider each of the points made by defendant Walsh, on his appeal; and then to consider each of the points made by complainant Preston, on his appeal.

I.

The first point made by defendant Walsh, is that the United States Circuit Court, below, had no jurisdiction.

The basis of this point is that defendant Walsh is sued as a public officer, and that it is therefore in effect a suit against the State of Texas; and that it is therefore in violation of the XI Amendment to the United States Constitution; which prohibits suits by a citizen against a State.

The answer to this objection is found in a long series of decisions of this court.

Osborn vs. Bank U. S. 9 Wheaton, 738;
Gray vs. Davis, 16 Wallace, 203;
Board of Liquidation vs. McComb, 92 U. S. 541;
U. S. vs. Custis Lee (the "Arlington case"), recently decided.

Those cases have fixed the rule to be that:

"In deciding who are parties to the suit, the court will not look beyond the record; that making a State officer a party does not make

the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest;" and that, "a circuit court of the United States may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of complainant."

II.

The second point made by defendant Walsh is, that the colonization contract between President Sam Houston and Gen. Mercer was void for unconstitutionality or fraud.

The Texas statutes by which President Houston was authorized and directed to make this contract, will be found in 1 Paschal's Digest of Texas Statutes, pages 234, 235. They are reprinted in the Appendix to the briefs for Preston in this case.

That the Texan Congress had the right to authorize this contract and grant, is beyond doubt; and that President Houston had full authority is equally clear. This was settled in 1858 by a decision of the Supreme Court of Texas upon the validity of this identical contract.

In Melton vs. Cobb, 21 Texas, 539, it was said by the court:

"That the [Mercer] contract of the 29th of January, 1844, if valid, reserved the land in question from location and appropriation by the plaintiff's certificate, can not be doubted. But it is insisted that the contract was invalid, for the want of authority on the part of the President of the Republic, to confer on the grantee [Mercer] the benefits contemplated by the joint resolution of the 16th February, 1843. He *undoubtedly* had authority under the act of the 4th of February, 1841, and the amendatory act of the 5th February, 1842, to contract with the grantee to colonize vacant land of the Republic for that purpose, and to set apart and reserve from location the territory within certain boundaries, which he should designate." The court then goes on to show repeated ratifications of the contract by the legislature and say:

"It is unnecessary to refer to more recent acts containing similar recognitions of the validity of the contract. It will suffice to say that these legislative recognitions of its validity must be deemed to have *put that question at rest.*" (Melton vs. Cobb, 21 Texas, 542.)

Mercer's Colony grant will be found fully recognized in the Statutes of Texas. (1 Paschal's Digest of the Statutes of Texas, sections 261 and 886 to 916 inclusive.)

And the Texas Reports abound with cases in which similar grants have been sustained as valid.

As to the charge of "fraud" on the part of President Houston in issuing the grant; it was abandoned entirely and not attempted to be proved. It was a mere slander on the dead hero of Texas. When in the Texas Constitutional Convention of 1845 certain parties attempted to secure a repudiation of the colony grants by charging "fraud" on Houston and Mercer, Judge Lipscomb replied, "Few men have stood higher for virtue, talent, and political influence than Charles Fenton Mercer;" and Mr. Evans said, "I have had the pleasure of personally knowing General Mercer and believe him above the *suspicion* of fraud." And the charge of fraud against General Houston was repelled with indignant scorn. The Texas Constitutional Convention of 1866 stopped its labors and *unanimously* placed in the very Constitution of the State a resolution which recited:

"The death of General Sam. Houston is a national calamity, and that in consideration of his pre-eminent abilities, great experience, and exalted patriotism, his high character and enthusiastic devotion to the interest and cause of Texas from the beginning of the struggle for independence throughout our revolutionary war, our existence as a Republic, and our life as a State, and in appreciation of the *faithful discharge* of his duties as commander-in-chief of the army, *President of the Republic*, as United States Senator, and as Governor of the State," etc. (1 Paschal's Digest of Statutes, page 952.)

The only ground of the charge of "fraud" was that General Houston signed this colony contract after he felt sure that the *legislature* had determined to repeal the law which then authorized him to do so; but before such repeal! (See the debates of the convention of 1845.)

In Johnson vs. Smith, 21 Texas, 722, it was held that a grant by the Republic could not be impeached for fraud; and that "the issue of a grant precludes inquiry as to the merits and qualifications of the grantee." The principle that a grant by the President can not

be impeached collaterally for fraud is also established in the following case:

Bowmer vs. Hicks, 22 Texas, 161.

In Todd & Fisher vs. Miller, 26 Texas, 247, a similar charge of fraud was made as to the similar colony contract of Todd & Fisher. But the court said, "There is not the *slightest pretense* in the record upon which to base a charge of fraud."

In the suit brought by the Governor in Navarro County against Mercer in 1848, to cancel the contract, it was not even alleged that there was any *fraud*. (See record, page 321.)

And Judge Pardee did not think the charge of "fraud" to be of sufficient dignity to be worthy of notice in his opinion, below.

III.

The third point made by defendant Walsh is that the court below was wrong in finding that Mercer and his associates introduced 1,256 families into the Mercer's Colony boundaries.

The proof on this question is, notwithstanding the great lapse of time, sufficient and satisfactory.

The several official reports of Mercer to the Republic show that immediately upon the execution of the contract, he began in a most active and energetic manner to excite immigration to his colony. For example, in his report of December 31, 1845, he says:

"The undersigned, in the prosecution of his duties as chief agent of the Texas Association, has made seven voyages by sea; traveled more than 8,500 miles by land, including journeys of 1,300 miles on horseback through the colonial lands and near the frontiers of Texas. He has published more than 2,000 handbills; had 1,100 maps lithographed of the colonial lands; advertised the terms of emigration in more than twenty newspapers, printed in Arkansas, Missouri, Illinois, Indiana, Ohio, Virginia, Florida, New York, and the District of Columbia; and carried on an extensive correspondence throughout the United States; diligently devoting two years of his life to the fulfillment of his contract with the Texan government, and his duty as chief agent of the Texas Association." (Record, page 174)

By May 1, 1845, 119 families had been introduced and settled by Mercer in the boundaries of the colony grant; and an official

report was made by him of their names, signed by the emigrants themselves, under oath, and attested and proved by the oaths of three witnesses. This official report was received by the State of Texas; was not disputed; and was filed among the public records and archives of the State. (See record, pp. 101 to 105.) The settling of the 119 families in the first year, is also proved by the deposition of P. J. Pillans, who was one of the persons who took down their names in 1845. (See record, 161.)

In his official report of September 25th, 1845, after showing with great minuteness the energetic and successful efforts and methods he had used to induce emigration, he shows that at least 220 families had then been settled. But he therein states some of the threats and obstructions which immediately upon the then recent annexation to the Union, had begun to be thrown in his way by State officers. (Record, p. 82.)

On December 31, 1845, he made his fourth official report in which he sets out in detail the great and growing obstructions and hostile legislation and officialism; but shows his unceasing efforts to have continued, and that over four hundred families had been introduced up to that time. (Record, pp. 174, etc.)

Similar reports were made by Mercer from time to time.

But, by the end of the year 1845, under the influence of an "ordinance" passed by the Constitutional Convention of 1845, by which it was declared that the colony grants were "believed" to be unconstitutional; and under the influence of oppressive and hostile legislation and obstructing officialism, things had gotten to such a state that the colonists introduced by Mercer were afraid or unwilling, after settling, to publicly acknowledge that they were introduced under the then unpopular and abused auspices of the colony contract. Hence, Mercer was unable to furnish their sworn acknowledgments; as he had furnished those who he had settled there prior to May 1, 1845, before the annexation and before the passage of that demagogueing "ordinance."

But Mercer continued his personal efforts, his correspondence, and his advertisements; and, by reason of them, as well as by reason of the lasting and continuing effects of the widespread efforts already made by him, the tide of emigration continued to flow into his colony.

By the 25th day of October, 1848, 1,256 "settlers" had been introduced and settled in his colony, as "colonists."

How many more were settled there between that date and January 29th, 1849, when the five years covered by his contract expired, does not appear, because the defendant Walsh refused to furnish the information in his answer; although it must appear on the records of the certificates and patents issued from his office.

On February 2, 1850, the Legislature of Texas passed an act "for the relief of the *citizens of Mercer's Colony*." It provided that a commissioner should be appointed by the Governor, and that said commissioner should "hear proof and determine" what persons were "*colonists*" of "the colony of Charles Fenton Mercer and his associates on the 25th of October, 1848;" and, that said commissioner should issue a certificate for 640 acres of land in Mercer's Colony to every family which should be adjudged by him to have become "a colonist of the colony of Mercer and his associates" prior to the 25th of October, 1868, and who should prove before him "by their own oaths supported by the oaths of two respectable witnesses that they emigrated to Texas and became citizens of said *colony* prior to the 25th of October, 1848."

The act required the commissioner to take oath of office; to sit as a court at each county-seat within the colony; to hear proof and determine; and to keep a record of the proceedings before him, which record should be finally deposited in the General Land Office.

The last section of the act provided for an "appeal" from the the "*judgment*" of the commissioner, to the district court; and for an "affirmance" or "reversal" of the "judgment" by that court. (See the act in Hartley's Digest, page 702; and in the "Appendix" to briefs for Preston.)

In short, the "commissioner" was a court, to sit in "judgment" and "hear and determine who had emigrated" as "colonists" to Mercer's Colony during the period provided for in the Mercer contract. The date "October 25th, 1868," was fixed as the limit of time, because the colony contract was pretended to have been annulled as of that date by the judgment in Navarro County hereafter to be referred to.

It was just such a "commission" as was established by the act of the United States Congress to "hear and determine" with respect to the Mexican land grants in California as shown in the famous

California land grant case of United States vs. Fremont, 17 Howard, 542.

Hon. John M. Crockett was appointed "commissioner" under that act, and he performed the duties required therein.

He testifies (record, pages 297 to 300), that he "traveled all over the colony and became acquainted with all the *colonists*," in 1850 and 1851; that he "examined into the proofs as required by the statute, and thereupon issued certificates to such as made the proofs required by the statute," amounting in all to 1,256 families; and that he made a written official report of his official acts.

In his answer to the eighth interrogatory he shows that he rejected the claims of all who did not prove themselves to have been "colonists."

A copy of the official report of the commissioner was read in evidence herein, and it is contained in the record, pp. 116 to 142. It is headed "Record of Certificates issued to the Citizens of *Mercer Colony*, concluded September 30, 1851, by John M. Crockett, Commissioner"; and at its close it contains a written certificate by Crockett, under oath, as "Commissioner of Mercer's Colony," stating that the list was a correct one of "the certificates issued by me to the *settlers* of *said colony*." (Record, p. 142.) This official report gives the names of the 1,256 "settlers" who "emigrated" and became "colonists of Mercer's Colony" prior to October, 1868, as the said act of 1850 required.

That record of the "judgments" of the commissioner is of itself sufficient evidence to support the judgment of Judge Pardee in this case. Indeed, it is *conclusive*. The "judgments" of the "commissioner" were not "appealed" to the district court; and therefore were *final*.

That such is the force and effect of the judgments of the commissioner, evidenced by his official record or report, see

Hatch v. Dunn, 11 Texas, 717.

It is there said that the decision of the commissioner will not be reviewed; and that to review his decisions would be "alike unwarrantable and dangerous." (See also Hancock v. McKinney, 7 Texas, 443.)

This evidence from Mercer's and Crockett's official reports is strongly supported, too, by other evidence in the record.

Thus, P. J. Pillans, who was one of Mercer's surveyors and agents in 1844 and 1845, substantiates Mercer's reports, and shows that he

himself met and knew that over 119 families settled in the first year; and that the emigrants were pouring in all the time, by reason of Mercer's efforts. (Record, 159 to 166.)

Theodore Garnett proves that he went through the colony in March, 1847, and that he then obtained lists of them for Mercer, and that the colonists settled by that time were "*largely* in excess of the number required by the terms of the contract up to that date." (Record, p. 184.)

Claudius Duvall proves that at a meeting of the "Texas Association" in 1852, the then trustee, Col. George Hancock, reported "that General Mercer had placed some 1,200 or 1,300 families within the grant." (Record, p. 235.)

R. A. Terrell, a witness for respondent Walsh, testifies that "a *great many* families settled in the limits of Mercer's Colony, east of Trinity River, in 1844, 1845, and 1846." (Record, p. 274.)

J. M. Riggs, a witness for respondent Walsh, testifies that in one place in the colony, now known as Corsicana, there were 400 or 500 persons in 1848. (Record, p. 318.)

The contention on the part of respondent Walsh that it is not proved that Mercer *introduced* those 1,256 families, is best answered by a sentence from Judge Pardee's opinion in this case (10 Federal Reporter, 322):

"The families were there; and settlers. They could only be there, lawfully, under Mercer and the Texas Association. In the absence of proof, it is a strong presumption that they were there lawfully; that is, under Mercer and the Texas Association; not as *trespassers* and squatters. Besides this presumption, I do not regard it as absolutely necessary that every settler who located in Mercer's Colony should have been previously personally solicited and induced thereto by Mercer or his agents. The contractors could not have so contemplated. One settler would naturally induce others; and the advertisements, and maps, and advantages, and improvements would certainly aid in the scheme of colonization and settlement."

And the testimony of several of respondent's witnesses, that the colonists did not, in 1850 and 1851, claim under Mercer, is explained by another sentence of Judge Pardee's opinion:

"And it is plausible to say, that, under the hostile attitude evinced by the people of the State at that time toward the colonization contracts, many settlers might have been deterred from *claiming*

under obnoxious titles; particularly when such *claim* was wholly unnecessary."

The assertion may safely be ventured, that of the many cases in which colony contracts have been sustained by the courts, there has rarely if ever been one in which the evidence of the settlement of families has been as full and reliable as it is in the depositions in this case, and in the official reports of Mercer, and in the recorded "judgments" of Commissioner Crockett.

IV.

The fourth point made by respondent Walsh is that the contract was forfeited by reason of Mercer and his associates failing to perform their covenants thereunder.

A reading of the contract will disclose that there is *no forfeiture provided for* in it, of any kind.

The only clause in the contract which looks toward terminating it, is the provision that unless Mercer should settle at least one hundred families in the first year, and at least one hundred and fifty in each succeeding year, his right to "proceed *further*" should "cease and determine from the moment of such default." But that clause further provided:

"But such default shall not operate retrospectively, but leave to the party of the second part and all persons claiming under them, whatever right, title, or interest they may have acquired from the action of the second party and their legal representatives prior to such default, to the same extent as if no such default or failure had occurred." (Record, 99.)

The Supreme Court of Texas, speaking of one of Todd & Fisher's colony contracts, similar to Mercer's, said that the breach of none of its terms and conditions by the colony contractor could work a retrospective forfeiture; and that the only failure that could affect the contractor's rights at all would be the failure to settle the required number of colonists. (Todd vs. Fisher, 26 Texas, 246.)

The court there said, "It is evident, at least, that a failure to introduce one third of the colonists into the Republic within the period of twelve months, was the only express ground of forfeiture

stipulated in the contract, . . . and that no other has, at any time, been established or expressly asserted by the State."

The various minor provisions of the contract, with respect to the colonists having rifles and powder and ball, and building cabins, are not made grounds of forfeiture or cancellation; and are not to be considered such in law.

Ledyard vs. Brown, 27 Texas, 403;
Todd vs. Fisher, 26 Texas, 241;
United States vs. Rodman, 15 Peters, 139.

Indeed, by the terms of Mercer's contract, the guns and cabins, etc. were to be furnished by the colonist and not by Mercer. (Record, page 92.)

We have seen that as to the settlement of the requisite number of families there was no failure on the part of Mercer.

And, even if there had been any clause forfeiting the contract for failure to perform the minor items, the proof of their substantial performance is abundant.

In Melton vs. Cobb, 21 Texas, 543, decided in 1858, where the validity of this colony contract of Mercer was the question involved, the court said, "It is said that the colony contractors forfeited their rights by failure to perform the requirements of the law and their contract; but of this the record affords no evidence."

Mercer's reports, and the depositions of Pillans and others show that the colonists were "living" on the lands and had "built their cabins." (Record, 165.) Crockett also proves this by showing, in 1851, that they had been living there for several years; which they could not have done without houses. One could not be a "settler" with a family without a house to live in. The report of the one hundred and nineteen families for the first year, for example, explicitly shows that each family "has and occupies a small cabin or house as described in said contract." (Record, page 102.)

The same thing is true with respect to guns and ammunition. Thus, for example, that sworn list of the first year's settlers shows that "each male member of the age of seventeen and upward is supplied with a good rifle, yager, or musket, and a sufficient supply of prime ammunition." (Record, p. 102.) Several of Mercer's reports show that he had furnished large supplies of ammunition. (See pp. 85, 174, etc.) And Pillans and others testify that the contract was in all

these respects abundantly satisfied. (Record, p. 165.) J. M. Riggs, one of respondent's witnesses, testifies that

"Mercer built a warehouse on the east bank of Trinity River, and the western boundary of Henderson County. It was represented to contain ammunition and stores for settlers, but I never saw it. When the suit between the Governor and Mercer was decided, I issued, as clerk of the district court, an execution against Mercer, and directed it to the sheriff of Henderson County. He levied it on the warehouse." (Record, pp. 319 and 320.)

As to the charge of Mercer not making the required surveys and maps. In the first place, no survey of exterior boundaries was required by the contract. See Ledyard v. Brown, 27 Texas, 403, where it is said, "It was not contemplated that the colonial boundaries should be ascertained and marked off by actual survey, before they were carried into execution. In fact this would often have been impracticable; and the division lines between the colonies were really a matter of but little public importance. The object of the government was to populate the country."

In the second place, Mercer made full and exact surveys; spending great labor and much money therefor, and notwithstanding many threats and obstructions. This is shown by his official reports and by the depositions of Pillans, Garnett, Terrell, and others. The proof on this point is very clear—showing surveying parties under Mercer all over the grant. (See record, pp. 159 to 166; 177, 273, etc., etc.)

In the third place, there is no provision of the contract for forfeiting it on any such ground; and no such provision of forfeiture will be injected by the chancellor.

Todd & Fisher v. Miller, 26 Texas, 246;

U. S. v. Rodman, 15 Peters, 139.

But even if there had been any clauses of forfeiture for non-performance of these matters, and even if Mercer had failed to perform them, there could be no forfeiture enforced against him. For, the record teems with evidence showing how Mercer and his agents were threatened and obstructed and stopped by persons incited thereto by the passage of the fraudulent "ordinance" of 1845 against the colony contractors, and by the hostile legislation and officialism of the State. Such obstructions, caused by such action of the State, would have excused non-performance by Mercer.

U. S. v. Arredondo, 6 Peters;
U. S. v. Fremont, 17 Howard;
U. S. v. Vaca, 18 Howard, 556.

In those cases the mere change of government, and the disorganization and change of circumstances incident thereto, were held sufficient acts of the State to excuse non-performance by the contractor.

If there had been an express provision for forfeiture for failure to perform any of the covenants, and if Mercer had, without excuse, failed to perform them; still, there has been no forfeiture.

Whatever conditions there were in the grant, if there were any, were clearly conditions subsequent. They were all to be performed *after* the grant; and therefore were necessarily conditions *subsequent.*

U. S. vs. Arredondo, 6 Peters, 745;
Fremont vs. U. S. 17 Howard, 542;
Hancock vs. McKinney, 7 Texas, 454;
Davis vs. Gray, 16 Wallace.

And it is well settled by the laws of Texas that "the non-performance of conditions subsequent, annexed to the grant, does *not* defeat the estate of the grantee and restore the land to the mass of vacant public domain;" but "the forfeiture must be ascertained by *judicial inquiry* in some mode to be provided by law, in order to divest the title of the grantee, before the State could resume the grant or otherwise appropriate the land." (Bowmer vs. Hicks, 22 Texas, 161, 162; a case arising the "*Robertson Colony*" grant.)

The court there reversed the case because the court below instructed the jury that the failure of the colonist to perform the conditions subsequent in his grant, annulled it.

In Luter vs. Mayfield, 26 Texas, 325, it was held:

"It is settled law in this State that, since the adoption of the State Constitution individuals locating lands which had previously been granted, can not assert a right thereto on the ground of forfeiture by the grantee by reason of his non-compliance with the terms of the original grant."

And, besides all this, there has never since 1845 been any law in Texas under which there could be any steps taken to forfeit lands to the State. The State has never passed any "forfeiture" laws.

(See Hancock vs. McKinney, 7 Texas, 455, 456; Swift vs. Herrera, 9 Texas, 279, a colony contract case; Jones vs. McMasters, 20 Howard, 11; Airhart vs. Massieu, 8 Otto, 498; Sabriego vs. White, 30 Texas, 589.)

And, again, it is settled that in such colony grants a strict and literal compliance of the rather vague and general conditions they contained is not required.

A performance *cy pres* is all that is required in such cases. Thus, in U. S. vs. Arredondo, 6 Peters, 745, it was found that the contractor had not performed the condition of settling the two hundred families required. But the court said, "A court of equity, acting on more liberal principles, will soften the rigor of law, and though the party can not show a legal compliance with the condition, if he can do it *cy pres* they will protect and save him from forfeiture."

And in Fremont vs. U. S. 17 Howard, 560, Fremont failed to take possession or to build houses, or to have the land surveyed; all of which were express conditions of the grant. But this court decreed him title, holding that a failure in these matters should not be allowed to forfeit the contract for a grant. The same thing was held in U. S. vs. Reading, 18 Howard, 5; and U. S. vs. Sibbald, 10 Peters, 323; Hornsby vs. U. S. 10 Wallace, 240.

V.

The fifth point made by Walsh, is that the colony contract was *forfeited* by subsequent legislation, and a constitutional "ordinance," of Texas.

1. The first act in relation to the colony grants which was passed after the Mercer contract was made was that of January 30, 1844. (Hartley's Digest, 652, and Appendix to briefs for Preston.)

It provided in effect that the power in the President to make other colony grants, thereafter, should stand repealed; and that all colony grants theretofore made, the *conditions* of which *had* not been, or should not thereafter be, strictly complied with "are hereby declared forfeited." And it provided that the President and the attorney-general should inquire strictly into the performance of condi-

tions by the colony contractors, and declare the grants forfeited "by proclamation" the moment such failure occurred.

As no such "proclamation" was made as to Mercer's contract, the presumption is that he performed all his conditions.

Of course, however, this attempt to add conditions of forfeiture to a previous grant was simply void, as retrospective as an attempt to impair the obligation of a contract, and as disturbing vested rights.

Green vs. Biddle, 8 Wheaton, 2;
Hamilton vs. Flinn, 21 Texas, 716;
Sequestration Cases, 30 Texas, 689.

2. The second act in relation to the colonies was the "joint resolution" of February 3, 1845. (Hartley's Digest, 660; and Appendix to briefs for Preston.) It was entitled "An act to establish the *limits* of Mercer's Colony." It, in substance, requires "General Mercer and his associates," to "have the 'lines'" of "THEIR colony LAND" surveyed and marked by "the first day of April next;" and provided that a failure to do so "shall work a forfeiture of *their* contract."

This act is significant in several aspects. It recognizes the "contract" as a valid and existing one and ratifies it thoroughly. "This act can not be regarded as any thing less than a virtual *ratification* by the government of the act of its agent in making the contract; and its legislative affirmation of its validity." (Melton vs. Cobb, 21 Texas, 541.)

It recognizes the grant as having been a grant *in presenti*, vesting title in Mercer and his associates, by speaking of the land as "*their* colony land." And it fixes the fact that up to that time, February 3, 1845, there had been nothing done or omitted by Mercer to forfeit his rights; otherwise he would have had no colony boundaries to run.

The act was of course void, as attempting to impose a new burden and condition on Mercer not contained in his contract; for that did not require him to survey those boundaries. (Ledyard vs. Brown, 27 Texas, 403.) Article 16 of the Texas Bill of Rights provided that "no retrospective, or *ex post facto* law, or laws impairing the obligation of contracts shall be made." (Constitution of Texas Republic, 1 Paschal's Digest Statutes, page 42.)

But, nevertheless, the evidence shows that Mercer complied with the requirement of the act. It only provided for the outside lines,

the "limit," to be surveyed. It is indexed "contractors of Mercer's Colony to run *exterior* lines." (1 Paschal's Digest Statutes, page 988.)

Mercer's official reports, and the depositions of Pillans, Terrell, and others show that these exterior lines were run and stakes driven down at every mile; and that he also sectioned off a large portion of the interior. (See record, pages 160 to 164; 273 to 275.) Mercer's report of date September 25, 1845, shows $2,883.50 spent for that survey. (Record, 85, 172, 179, etc.)

3. The next hostile act was that of June 25th, 1845; to be found in Hartley's Digest, page 662, and in our Appendix.

That act provided that the Land Commissioner should issue patents to all persons, if any, who had made locations and surveys in Mercer's Colony *before the surveyor* of that district had learned of the making of the Mercer contract. (Melton vs. Cobb, 21 Texas, 542.) It did not attempt to declare a forfeiture of Mercer's contract, and did not recite or claim any forfeiture to have taken place. It was, of course, wholly unconstitutional and void so far as it sought to affect or impair Mercer's rights.

It will be observed, on reading that act, that it recites and recognizes minutely the grant to Mercer; as "The colonization contract made on the 29th day of January, 1844, between Sam Houston, then President of the Republic of Texas, *acting in behalf of the Republic*, and Charles Fenton Mercer and his associates." It will also be observed that although passed nearly three months after the 1st of April, when the survey of the exterior lines was to be completed, there is no claim of forfeiture.

In Melton vs. Cobb, 21 Texas, 541, it is said:

"The contract was again expressly recognized and treated as an existing contract by the Act of June 25, 1845."

4. The next act relied on by Walsh, is the "Ordinance" passed by the Texas Constitutional Convention of 1845; and to be found in Hartley's Digest, page 84; and in our Appendix.

That ordinance recites in its preamble that whereas "various contracts have been entered into by the President of the Republic of Texas with divers individuals with the expressed intention of colonizing an enormous amount of the public domain;" and, whereas, "it is *believed*" that the said contracts are "*unconstitutional* and therefore void from the *beginning*." And it then proceeds to direct that "as

soon as the organization of the State shall be completed" the attorney-general shall "institute legal proceedings against all the colony contractors" to test the question as to whether they were valid or void, and as to whether the "conditions" of the same had been "complied with according to their terms."

That "Ordinance" was not a part of the Constitution, but was a separate instrument, and was to be voted on separately. It was not forwarded to the United States Congress as a part of the Texas Constitution; but was suppressed. (Executive Documents, 1st Session, 29th Congress United States, vol. 1, page 104.) The debates over the ordinance, in the Texas convention, shows that this separation and suppression was because they knew it was in violation of the Constitution, and an outrage on vested rights and contracts that the United States would not permit or countenance.

The "Articles of Annexation" adopted just before, had provided that Texas should faithfully pay off all of its obligations; and the United States had (contrary to its habit in admitting Florida, California, and other States) permitted Texas to retain its vacant lands for the express purpose of satisfying such liabilities. And in the Constitution which Texas then adopted and sent on to the United States Congress for approval, as a condition of annexation, it had solemnly provided:

"Sec. 20. The rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested: . . . but the same shall *remain* precisely in the situation which they were before the adoption of this Constitution." (1 Paschal's Digest, p. 65.)

The first thing to be observed about that ordinance is that the convention was not called or empowered to pass "ordinances," but for the particular and defined purpose of "the adoption of a *Constitution* for the *State* of Texas." (Act of June 23, 1845; 1 Paschal's Digest, p. 45.)

The delegates to the convention were elected only for that purpose. (*Ibid.*)

When they had prepared and adopted that Constitution, their power was exhausted. They had no more right to usurp the functions of the then existing legislature of the Republic, and go on and pass "ordinances" or acts, than they had to usurp judicial powers. When that "ordinance" was passed, the Constitution of the Repub-

lic was in full force and remained in force until December 29, 1845 (Calkin vs. Cocke, 14 Howard, 235), and those delegates were acting under the legislative act, under that Constitution, and derived their limited power therefrom. By that Constitution of the Republic the power of *making laws* was vested *exclusively* in the *legislature*. (Art. 1. secs. 2 and 22.) That power was not surrendered to the convention, and could not be usurped by it. (State vs. Swisher, 17 Texas, 448.)

The "Ordinance" was therefore void for want of authority in those who made it.

So far as it might have been intended to effect, impair, or obstruct the rights of Mercer, it was certainly void. This court has repeatedly held that neither constitutions nor ordinances can impair contracts or vested rights. The precise question under a Texas "ordinance" was decided in Davis vs. Gray, 16 Wallace, 232. (See also Gunn vs. Barry, 15 Wallace, 610.)

It will be observed too, that the ordinance does not attempt to declare that the contracts *are* void or *are* forfeited. It only says that they are "*believed*" to be void.

In a very learned opinion by Mr. Attorney General Caleb Cushing, sustaining these "Texas colonization grants," dated in 1855, and reported in Opinions of Attorney Generals, vol. 8, p. 537, he says of this ordinance:

"The preamble expresses a *belief* that the colonization contracts made by the Republic were unconstitutional and therefore void from the beginning. This expression of *belief* decides nothing in fact, and is immaterial to the question."

In Caudle vs. Weldon, 32 Texas, 358, where the rights under "Peters' Colony" contract were in question, the court held that the "ordinance of 1845" was not self-acting but was "predicated upon an anticipated" legal proceeding; which the court adds, "was never had." And it was held in that case that the ordinance therefore "has no force or effect in the present controversy."

In pursuance of that void ordinance, the legislature, on May 11, 1846, passed an act "to define the duties of the attorney-general" by which it provided that the attorney-general should "file the petition or information and institute legal proceedings against *all* colony contractors who have entered into contracts with the President of the

Republic of Texas," in any district court for any county within the colony boundary.

This act of course does not forfeit any thing; but on the contrary, recognizes the colony contracts as still in force. It does not say why the attorney-general should so sue or file informations, nor what he should sue for, nor what he should allege. It is too vague and meaningless to be the basis of any *forfeiture*. (It will be found in Hartley's Digest, page 104; and in our Appendix.)

5. The next legislative act relied on by Walsh is the act of February 2, 1850, to be found in Hartley's Digest, page 702. We have already given a synopsis of its contents (*ante page* —).

It provides, in effect, for a commissioner, who should go into Mercer's Colony and "hear and determine" and give "judgment" as to how many persons there were who had "*emigrated*" to Texas and "*settled*" as "*colonists* of the colony of Charles F. Mercer;" and that he should issue to each of such "colonists" a certificate for 640 acres of land.

This act not only does not declare any forfeiture of Mercer's contract, but treats it as still in existence, and speaks of the lands as "Mercer's Colony;" and says the colonists are "entitled" to the land. Now, the colonists were only "entitled," through Mercer, and under his contract. This act therefore recognizes fully Mercer's contract as still existing and in force in 1850.

6. The next act is that of January 24, 1854, to be found in our Appendix. It does not attempt to declare any forfeiture of Mercer's rights, but does violate his rights by ordering the issue of certificates to "settlers as colonists" in the colony; instead of to Mercer as the contract provided.

7. The next act with relation to "Mercer's Colony" is that of February 16, 1852; Texas Laws of 1852, page 136, and our Appendix.

That act by its first section waives in behalf of the State all the conditions of the contract and only requires the "colonist," in order to get 640 acres, to prove that he was a "resident citizen of said colony *January 29th, 1849.*" This act is very significant. "January 29th, 1849," was the last day of the five years in which Mercer was allowed to settle "colonists" in his colony. It is, therefore, a recognition of the continued existence of Mercer's contract, and his

continued settlement of "colonists" therein up to the last day of the five years provided for in his contract.

There were additional acts, supplementing those, passed in 1854, 1856, and 1857, all recognizing Mercer's contract, but they contain nothing new or material. They will be found in our Appendix.

The Supreme Court of Texas, in 1858, after all these statutes had been passed, held that none of them had in any way forfeited or destroyed Mercer's rights; but that they were, on the contrary, "repeated recognitions" of his rights as still existing. (Melton vs. Cobb, 21 Texas.)

These acts and that ordinance, however, by stirring up hostility and mutiny among the colonists against Mercer and leading them to endeavor to repudiate his rights, operated as an obstruction and hindrance, through the fault of the State, which would have excused Mercer had he failed to perform strictly any of his covenants; and it excused him from producing further sworn certificates from his settlers, as he had produced from 119 settled in the first year before this hostile legislation began. This is clear from the principles laid down in

United States vs. Arredondo, 6 Peters, 745;
Fremont vs. United States, 17 Howard, 563;
United States vs. Reading, 18 Howard, 6;
United States vs. Vaca, 18 Howard, 557.

VI.

The sixth point made by Walsh is that the contract of Mercer was canceled and annulled by a "judgment" rendered September 25, 1848, in the Navarro District Court, in the case of A. C. Horton, acting Governor, vs. C. F. Mercer and his unknown associates. (See a transcript of the record of that suit, on pages 320 to 326 of the record herein.)

A synopsis of that suit is as follows:

On October 11, 1846, there was filed in the Navarro County District Court, the "Petition of *Albert C. Horton*, acting Governor of the State of Texas, who in his official capacity as aforesaid institutes this suit in behalf of the *people* of said State," against "C. F. Mercer and his associates." It set out the Mercer contract and its contents, and charged in very vague and general terms, that it was "made in violation of the Constitution of the Republic and was

therefore null and void from the beginning;" without saying how or why. And it also charged that Mercer had failed to introduce and settle one hundred families during the first year, and had failed to settle one hundred and fifty more during the second year. On these grounds Horton prayed that said contract should be "decreed invalid" and "be decreed null and void from the beginning."

On March 25, 1847, Horton filed an amended petition in which he charged that the boundaries of the colony had been so run by Mercer as to make it embrace more land than it should; and in vague and indefinite terms, that "Mercer and his associates have violated all and singular the contracts and covenants contained in the contract of colonization;" without saying why or how. It contained no prayer for relief.

On the day it was filed, March 25, 1847, Thomas Jonson, district attorney (who had signed as attorney for Horton), made oath, "That he is informed and believes that defendant C. F. Mercer is a *non-resident* of the State of Texas, and *beyond the jurisdiction of this court;*" and that his *associates* are *unknown.*"

On July 12, 1847, the *clerk of the court* issued a "*writ*" addressed to the "sheriff of said county" which read:

"You are hereby commanded to summon Charles Fenton *Mercer* and his *associates, unknown*, to be and personally appear at and before the honorable district court of said county at the next term thereof, to be holden at the late residence of Wm. R. House in said county on the third Monday after the first Monday in October, 1847, *by publication*, as the law directs, in the Northern Standard, then and there to answer the petition of *Albert C. Horton*, Governor of the State of Texas acting in his official capacity in behalf of the *people* of said State, filed in said court against him, a copy of which petition accompanies this writ," etc.

The following return was made by the sheriff:

"In obedience to the command of the above *writ*, I *order* the same, together with the accompanying petitions, to be published in the Northern Standard eight successive weeks.

JAMES A. JOHNSON, *Sheriff N. C.*

On September 25, 1848, "the following proceedings were had":

"This day came the plaintiff by the district attorney, Josiah F. Crosby, and the *defendant* being solemnly called *came not*, and it appearing to the court that service had been perfected, and two terms

of the court having elapsed since *publication*, it is therefore ordered by the court that judgment final by *default* be rendered against said defendants in favor of said plaintiff. And thereupon came a jury of twelve good and lawful men, to wit [naming them] who being duly elected, impaneled, and sworn the truth to speak, upon their oaths do say, 'We the jury find the facts and allegations in the petition to be true.'" And therefore it is ordered, adjudged, and decreed by the court that the contract of colonization made and entered into between Sam. Houston, as President of the late Republic of Texas, and Charles Fenton Mercer, acting for himself and such associates as he shall choose, on the 29th day of January, 1844, be and the same hereby is adjudged *null and void*. And it is further ordered that plaintiff recover *his* costs, for which execution may issue."

The above, as certified by the official certificate of the clerk of the Navarro court, is a complete transcript of that case, containing "all the orders and judgment of the court in the above entitled cause."

The charges in that suit were of course false from beginning to end; and, had Mercer been notified of it, he could have easily defeated it. Thus, the vague charge of "unconstitutionality" was utterly unfounded; as had already been settled by many cases in Texas, where multitudes of land grants and colonization contracts had been upheld; and as it was explicitly held as to this very contract in Melton vs. Cobb, 21 Texas, 539. Thus, also, as we have seen, the official reports of Mercer, then on file in the land office, showed that the charge of Mercer's failure "to comply with his contract" was equally false; and besides, such failure, as we have seen, was not a ground of forfeiture, and did not warrant the judgment that the contract was "null and void." And the alleged wrong survey of the lines of the boundaries, was not only false, but was certainly not a ground for declaring the contract "void."

Mercer was not bound to run the colony lines at all. (Ledyard vs. Brown, 27 Texas, 403.) The subsequent legislation recognized his survey as correct.

There was plainly no evidence introduced. The judgment recites that it was a "default" judgment. The jury found, not from any *evidence*, but only on the "petition." The court, too, did not base its judgment on any evidence, but on its legal opinion that the contract was "void." The practice statute of Texas re-

quired that the court should "make out and incorporate with the records of the case a statement of the *facts proved* therein, on which the judgment was founded." (1 Paschal's Digest Statutes, art. 1488; 24 Texas, 190; 23 Texas, 263; 7 Texas, 575.) No such statement having been made out or filed, inference is that no "facts" were "proved."

But this Navarro "judgment" was not only absurdly erroneous and iniquitous, but it was a *mere nullity*: for many reasons, which we will state consecutively.

1. *There was no service, no seizure, and no appearance, by defendants "Mercer and his associates;" and therefore the Navarro court had no jurisdiction.*

The Navarro record shows affirmatively on its face that Mercer was "*non-resident* of the State of Texas and *beyond the jurisdiction* of this court," and that "his associates are *unknown*." (Record, 324.)

No personal process was even *issued* against him; and none was served on him. The only process issued was a "writ" by the clerk to the sheriff, telling him to "summons by *publication*."

The sheriff made no return of service, but only wrote on the writ, "I order the same to be *published*." He does not even return that it had been published, but only that he "orders" it to be.

No appearance was entered; and no defense made.

The judgment of the court not only does not claim to have been based on a service or appearance, but it expressly says that Mercer and his associates "came not," and that the service was by "publication," and that the judgment was by "*default*." (Record, 325.)

Nor was there any process of attachment, or any other process of seizure issued. Nor was there any seizure of any kind, or any levy, or other proceeding *in rem*. Nor was there any sheriff's return of seizure. Nor was there any judgment *in rem* against any property. The judgment was purely *in personam*, declaring that a "contract" was "null." (Record, 325.)

That a pretended "judgment" in such a proceeding is void for lack of jurisdiction, is clear.

In Brooklyn vs. Insurance Co. 9 Otto, 362, the town of Brooklyn, Illinois, brought suit in the State court to have certain alleged fraudulent bonds declared *void* and canceled. It made the non-

resident holders of the bonds parties defendant; and proceeded against them as non-residents, and obtained a judgment against them, declaring the bonds "void." The said holders of the bonds afterward sued on them in the Federal court, and the State judgment was pleaded in bar; just as the Navarro record is in this case.

This court held that the plea of the record was "radically defective" in that the said suit to declare the bonds void was a suit "*in personam* against the holders and owners:" and said that "upon principle and authority no decree therein rendered could bind any one not *personally* served with process or who did not appear. It could not affect the rights of the non-resident holder of bonds and coupons proceeded against by *constructive* service. Such service, as to them, was ineffective for any purpose whatever."

In Mohr vs. Manniere, 11 Otto, 422, it is said:

"In some instances the States have provided for citation upon a mere *constructive* service of process, by *publication;* but the Federal courts have not hesitated to hold such judgments invalid."

See also

Pennoyer vs. Neff, 5 Otto, 714;

Windson vs. McVeigh, 3 Otto, 274.

Where the court proceeds *in personam* there must be *personal* service to give jurisdiction; and where it proceeds *in rem* "there must be a *levy* on the property of defendant" and "the *seizure* of the property of defendant under the proper process of the court is the *foundation of the court's jurisdiction.*" (Cooper vs. Reynolds, 10 Wallace, 309; Pennoyer vs. Neff, 5 Otto, 714.)

An effort was made by Walsh to prove that Mercer and his associates had "*appeared* and defended" that suit; and, to show this the depositions of Crosby, the district attorney at the time, and Riggs, the Navarro clerk, were taken.

The recollections of such witnesses in 1881, as to who appeared in any one suit in 1848, are intrinsically unreliable. No lawyer or clerk could remember such a thing with respect to one case out of the many before him. Crosby states in the vaguest sort of way, and, as he says, "on the spur of the moment," that his "remembrance" is that "such papers as were filed in the case were signed by Wm. G. Hale (deceased) as attorney for defendants." (Record, 305 to 308.)

But there were "no papers filed" for defendants. He is unable to name any one who appeared for defendant. Riggs says the trial he remembers took place in "1849 or 1850," and that "Scurry, Tarrant, and Henderson" represented the "plaintiff," and "I do not remember whether any counsel represented the defendant." On cross-examination he says, "I do not think any attorney represented the defendant in said suit." (Record, 316, 319.)

This evidence is plainly inadequate to prove the appearance of defendants in that case. Indeed it is palpable that no one appeared.

What motive could Mercer have for appearing, except to make defense? And yet there is no *answer*, no *traverse*, nothing. How could there be a defense without a pleading?

The Navarro judgment which Crosby drew and Riggs entered contradicts them both; for it recites that the defendant "came not," and that the service was by "publication," and that the judgment was by "default." Why would Crosby have inserted in that judgment that there was service by "*publication*" if there had been an *appearance?*

In Galpin vs. Page, 18 Wallace, 366, and Settlemeir vs. Sullivan, 7 Otto, 449, it is settled that where the record shows a service by "publication," no personal service will be presumed.

In no State of the Union is this principle, that service, seizure, or appearance is necessary to give jurisdiction than in Texas.

Thus in Herrington vs. Williams, 31 Texas, 448, it was held:

"No *personal* judgment can be rendered against a non-resident without actual personal service of the citation or writ upon the party. In order to acquire jurisdiction through the *property*, where the party is a non-resident or absent from the State, there are certain essential prerequisites, prescribed by statute, to be performed, before the *jurisdiction* actually attaches so as to authorize an adjudication of the court upon the *rights of the parties*. There must be an affidavit made, bond and security given to the absent party, the impenetration of the writ of attachment, and its *actual levy* and return by the ministerial officer of the court, before the jurisdiction attaches in a proceeding *in rem*. Where none of these requirements have been complied with, no valid judgment could have been rendered, either against the land or the person."

In Stoddard vs. McMahon, 35 Texas, 295, it is said:

"It is by the *levy* and return of the sheriff that the jurisdiction of the court attaches."

A judgment of another State, without seizure or service, is treated as void by the Texas courts; and the defendant may even contradict the record to prove there was no service.

Easley vs. McClinton, 33 Texas, 288.

2. Even if there could have been a valid judgment against Mercer and associates on constructive service, the Navarro judgment was void, for not following the statute.

Prior to the act of May 13, 1846, there was no provision in Texas for proceedings on constructive service; except in "attachment" cases. All process had to be personally served; or the judgment would be void.

(McIlheny vs. Sechrest, reported in Dallam's Digest of the Laws of Texas, page 538; Hays vs. Barrera, 26 Texas, 81; Hartley's Digest of the Laws of Texas, article 676.)

By the 11th and 12th sections of that act of May 13, 1846, it was provided:

"That when it is alleged in the petition, or appears in the course of a suit, that any defendant is not an inhabitant of the State, that he is absent therefrom, or that he is a transient person; upon his agent or attorney making affidavit to the truth thereof, it shall be the duty of the clerk to issue a citation or writ to the sheriff or other proper officer of the county, setting forth therein, in addition to the requisites of an ordinary citation, a brief statement of the substance of the petition or suit in which the same is issued, requiring him to cite the defendant by making publication of the citation in some newspaper published in the county, if there be one, but, if not, then in the nearest adjoining county where there is one, for eight successive weeks previous to the return day of such process." (Hartley's Digest of Statutes, page 243.)

This statute does not dispense with the necessity of a seizure or levy. It authorizes this mode of notification of defendant, but the court can have no jurisdiction to disturb the title to any property unless there be also a levy or seizure of the property; and there was no levy or seizure here.

Herrington vs. Williams, 31 Texas, 457;
Stoddart vs. McMahon, 35 Texas, 295.

3. There was no such "affidavit to the truth" of the non-residence of Mercer, by the "plaintiff or his agent or attorney." There is an affidavit filed, but it does not charge the *fact* of non-residence, but only the affiant, Mr. Thomas Johnson's "belief" on the subject. This did not satisfy the statute. As to the "unknown" associates, the affiant does not say they are non-residents nor that they were unknown to the State. It does not say whom they are unknown to. This defect in the affidavit rendered the judgment void.

Herrington vs. Williams, 31 Texas, 457;
Doty vs. Moore, 16 Texas, 592.

4. There was no law in Texas which authorized a proceeding against Mercer's associates as "unknown" defendants. (Hartley's Digest, article 677.) In Bailey vs. Morgan, 13 Texas, 342, it was said, "Our statute does not authorize service of citation by publication on unknown non-resident defendants, not being the *heirs*, *successors*, or legal *representatives* of a *deceased* party."

A proceeding against "unknown" owners of property without a statute to authorize it, is void.

Hollingsworth vs. Barbour, 4 Peters, 466;
Bailey vs. Morgan, 13 Texas, 342.

And being void against Mercer's "associates," and the judgment being a joint one, it is void as against Mercer also.

Hulme vs. Janes, 6 Texas, 242;
Freeman on Judgments, 136.

5. Nor is there shown to have been any "publication" in fact. The only things which appear in the Navarro record on the subject are the memorandum by the sheriff that, "I *order* the same *to be* published;" and the recital in the judgment "it appearing to the court that service had been perfected and two terms of the court having elapsed since *publication*."

As to the sheriff's "order," it was evidently made *in advance* of publication and shows nothing; it makes no return that it *had been* published.

In Blossman vs. Letchford, 17 Texas, 647, it was held that the sheriff must "return the fact of the publication and the time and manner thereof" "as of his own knowledge;" and that in his return he had "ordered" it to be published, is insufficient; although accompanied by the affidavit of the publisher. The same thing was

held in Goodlove vs. Gray, 7 Texas, 483; Allen vs. Weyser, 29 Texas, 153.

In Lyon vs. Paschal, 45 Texas, 436, the sheriff's return only showed that the sheriff made "an *order* for its publication." It was held insufficient.

This defect, or rather total absence of a sheriff's return, showing publication according to statute, rendered the judgment void.

McCoy vs. Crawford, 9 Texas, 353.

The recital in the judgment, "it appearing to the court that service had been perfected" by "publication" does not supply the sheriff's return. The court does not show how often or when or where it was published. It was the sheriff and not the judge who was to officially report as to whether a proper publication had been made. (Blossman vs. Letchford, 17 Texas, 647; Goodlove vs. Gray, 7 Texas, 483.)

In Blossman vs. Letchford, 17 Texas, 647, which was a case very like this, the court held that "a recital in the judgment that it appeared to the court that service by publication had been perfected as required by law" did not cure the absence of the sheriff's return.

In Settlemeier vs. Sullivan, 7 Otto, 448, there was a recital in the judgment that the defendant was "duly served with process;" could not supply the necessity for a sheriff's return. And the court there held that in statutory proceedings on constructive process the court will not indulge any presumptions in favor of the judgment; citing Galpin vs. Page, 18 Wallace, 366.

6. The statute of Texas required that in all cases of procedure *ex parte* on constructive service the facts proved and which were made the basis of the judgment should be written out and filed in the record. And a failure to do this rendered the judgment invalid. (McFadden vs. Lockhart, 7 Texas, 573; Chrisman vs. Miller, 15 Texas, 160; Davis vs. Davis, 24 Texas, 187.) This was not done in the Navarro case.

In all such cases of constructive service "every principle of justice exacts a strict and literal compliance with the statutory provisions. And such we believe has been the ruling of the courts of every State in the Union." (Galpin vs. Page, 18 Wallace, 369; Settlemeier vs. Sullivan, 7 Otto, 449; Herrington vs. Williams, 31

Texas, 448; McRee vs. Brown, 45 Texas, 503; Stoddart vs. McMahon, 35 Texas, 295.)

7. The suit of "A. C. Horton, acting Governor," "for the benefit of the people" of Texas, was not a suit by the State of Texas, and could not affect the contract between the *State* and Mercer.

"Horton," although "acting Governor," was not the "State." He had no more right to sue in his name to affect the rights of the State than the legislature would have to sue in *its* name, and perhaps lose the State's case, or than the judicial department would have.

Indeed, Horton did not claim to sue for the benefit of the *State*, but for the benefit of the "people." The Texas Constitution and statutes provided that all writs and processes should run in the name of "The State;" and all suits which were to affect the State's rights could only be brought in the name of the State; and not in the name of some particular officer.

See Lawton vs. State, 5 Texas, 271;
Schultz vs. State, 13 Texas, 426;
Bainbridge vs. Downs, 6 Mass. 253;
Irish vs. Webster, 5 Greenleaf, 171;
Hunter vs. Field, 20 Ohio, 340;
Gaza vs. Bexar, 31 Texas, 485;

In Matthews vs. Offley, 3 Sumner, 115, *per* STORY, J., it was held:

"An action for a forfeiture or penalty must be brought in the name of the *Government*, and not of a private person; unless some other mode is expressly provided by statute." "A. C. Horton, acting Governor," had no more right to sue to cancel State's contract than any other stranger had.

The "Navarro judgment" then was wholly void, and in no manner affected the rights of Mercer and his associates."

So well was this realized by the profession in Texas that in Melton vs. Cobb, 21 Texas, 539, where the validity of Mercer's contract was assailed, the Navarro record was not even referred to.

VII.

The last point raised by Walsh is that the rights of Mercer and his associates have been lost by the statute of limitation, and lapse of time.

To this point there are several answers:

1. This is a case of an *express trust*, and in such cases neither the statute of limitations nor the lapse of time is a bar.

"As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed by trustees, extending over periods of thirty, forty, and even fifty years. The relations and privity between the trustee and the *cestui que trust* are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation. . . . It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee. He will then be in a position to maintain his claim; for no claim should be made through a breach of trust. And no trustee while occupying a place of trust should be allowed to set up an adverse title." (Perry on Trusts, section 863.)

That the contract between Mercer and the State constituted the State a trustee for him and his associates is clear.

"There is no particular formality required or necessary in the creation of the trust. Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner, or for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him, voluntarily, or with notice." (Perry on Trusts, sec. 92.)

The Republic by the contract agreed "that the unlocated lands included in the following boundaries, shall remain and be held by the government of this Republic for the purposes herein set forth . . . and shall be considered as set apart exclusively of all future claims . . . for the benefit of the party of the second part."

This is repeated in substance several times in the contract. (Record, 95, 98.)

This created an express trust; which is defined to be a trust "created by instruments that point out directly the property, persons, and purposes of the trust." (Perry on Trusts, sec. 24.)

A State can be a trustee. (Perry on Trusts, sec. 41; Tiffany & Bullard on Trusts.)

Speaking of the inchoate Spanish grants, this court said that they operated "to affect the conscience of the former sovereign *with a trust* and make him a *trustee* for the individual; according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district, according to the principles of justice, and the rules of equity." (Strother vs. Lucas, 12 Peters, 436.)

This trust passed to the State of Texas, when the Republic ceased to exist; and the State became the trustee. (Constitution of 1845 of State of Texas, art. 7, sec. 20; 1 Paschal's Digest Stat. page 65; New Orleans vs. U. S. 10 Peters, 662; 10 Peters, 326; 6 Peters, 691; 14 Peters, 353.)

2. But even if it were not a case of an express trust, the statute would not be a bar.

It is a settled rule of limitations that one's rights are never lost by time until his right of action accrues. As the State of Texas refused to permit Mercer and his associates to sue (although the privilege was repeatedly asked of the legislature) the statute is not a bar.

This is well illustrated in Whitney vs. State of Mississippi, 52 Miss. 732.

In that case Whitney sold to the State of Mississippi, in May, 1860, a large number of firearms. The State did not pay for them, and, as Whitney could not sue the State, he had to wait. In October, 1871, there was an act passed in Mississippi authorizing suits agains, the State; Whitney sued in March, 1874, on his open account. The State pleaded the statute of limitations. The Supreme Court held the plea bad, saying, "The statute of limitations constitutes no defense, because, although more than three years intervened between the making of the contract and the bringing of the suit, that period had not elapsed since the adoption of the new Code, October 1, 1871, by virtue of which alone the State was made amenable to suit. Without some statutory enactment permitting it, the State can not be sued. . . . The statute of limitations never runs where there is no person in being against whom a suit can be maintained."

See also Angell on Limitations, 49–54;
Wood on Limitations, page 254;
Richards vs. Maryland, 8 Cranch, 93.

3. It is a settled rule in Texas that if a reasonable excuse is given for the delay in bringing a bill in equity, the court will not apply the limitation.

McKim vs. Williams, 48 Texas, 92.

In this case the excuses for the delay to sue were certainly most reasonable. From 1849 when the five years for colonization ended, Mercer and his successor or Hancock were constantly endeavoring to get the State to pass an act *allowing them to sue.* This act would be passed by one branch of the legislature but would be dragged to the other until adjournment. This was kept up until the war.

From January 28, 1861, to March 30, 1870 (when the Texas Constitution of 1869 was accepted by Congress) the statute of limitations were suspended in Texas; because the disordered condition of the State and courts was considered a reasonable excuse for not suing. (Bender vs. Crawford, 33 Texas, 750.)

This suit was filed in March, 1875; after another ineffectual effort to get the Texas Legislature to act. (Record, 241.)

It would certainly seem a parody on justice if the complainant were held to have lost his rights against the State of Texas by not suing it during the time that he had no power to sue it and it was refusing to give him the right to sue.

4. Respondent Walsh has no right to plead the statute of limitations. Every new patent he issues is a new injury to complainant, and every threat of Walsh to issue one gives a new cause of action to complainant.

We submit therefore that the appeal of Walsh should fail.

Further Relief.

It remains, then, to consider the appeal of Preston, for further relief.

1. The first ground of Preston's complaint against the decree is that it fails to enjoin Walsh from issuing certificates, etc., on the general body of the vacant and unappropriated lands of Texas *outside* of the Mercer Colony bounds. The decree permits Walsh to dispose of all the public lands of Texas outside of the colony grant.

It appears from the record that the lands within the colony grant have well nigh all been taken into possession of others, without right,

but under patents issued by Walsh and other land commissioners, and there is very little left clear and unencumbered.

Equity and justice require that complainant's rights should be satisfied if possible, out of other lands not subject to such hostile claims and clouded titles.

When Texas applied to be annexed to the United States, her chief and well nigh only *currency* to satisfy her liabilities of every kind was her vast store of public lands. She owed debts to the amount of about $10,000,000, and was under these various liabilities to colony contractors, payable in land.

It is a well-recognized principle of international law that when one nation absorbs another the absorbing nation becomes responsible for the debts and liabilities of the nation absorbed.

In the debates on this question in the United States Senate, in August, 1852, General Houston, then a senator from Texas said, "Texas has not repudiated any of her liabilities." (Gouge's Financial History of Texas, page 211.)

In the same debate Mr. Pratt, of Maryland, said:

"Now I say that it is a proposition of national law, running down from the first elementary works to the latest writer on the subject, that where that case exists—where the sovereignty of one State has been merged in that of another, the State into which it is merged is liable for all the obligations of the other. I hold before me Rutherford's Institutes, who, speaking of the effect of the union by compact of two States into one says, 'Since both States thus continue in this united body and neither of them ceases to exist, the rights and obligations of both will remain and will become rights and obligations of the united body; that is whatever rights belong to each State separately before they were united will afterward be the rights of the collective State, and the same obligations that each State was under separately before, the collective State will be under afterward.'"

And again he said, "I say in reference to all the debts of Texas for which the National faith was pledged, we, having assumed the nationality which was pledged for their payment, have assumed the debt." (Gouge's Financial History of Texas, pages 213, 214.)

The Secretary of the Treasury, in officially reporting to the President, in 1852, on the public debt of Texas, said:

"The laws of nations which govern the subject are well under-

stood, and of easy application to the present question. The laws all proceed upon the idea that the moral obligations of independent States are binding when once they attach to compacts between States or between States and individuals, and that they never cease except by the voluntary agreement of the parties interested, or by their fulfillment and complete discharge. Hence where an independent power contracts obligations, and is afterward, by the act of another power, jointly with herself, incorporated into and subjected to the dominion of the latter, whereby the national responsibility of the former is destroyed, and the means of fulfilling her obligations transferred to the latter, all such obligations, to the extent *at least* of the means thus transferred, attach with all their force to the nation to whom such means have been so transferred.

"It will be found that all the writers on public law having authority are agreed upon this point, from the time of Grotius to the present. Indeed, the proposition thus asserted is so obviously just that it is not possible for a nation in modern times to controvert it, without forfeiting that character for justice and probity which, happily for mankind, has become indispensable for sovereign States. It was this view of the subject which, doubtless, dictated that provision of the law which I am considering."

Gouge's Fiscal History of Texas, page 300.

Realizing this, the United States at first proposed to take all of Texas's vacant lands, in order to apply them to the payment of its debts.

The first resolution of annexation offered by Stephen A. Douglass, provided that "the public lands in the said Territory of Texas be and they hereby are *pledged for* the payment of the debts for which the faith of Texas is pledged, . . . and after the extinguishment of said debt the residue of the proceeds of the sales of said lands, and the said customs and duties shall go into the treasury of the *United States.*" (Benton's Abridgement of Debates of Congress, vol. 15, page 171.)

The resolution offered by Mr. Ashley was:

"That all the public lands within the limits of said Republic be pledged for the payment of its debts, and transferred to the United States *in trust* to be sold and disposed of in the same manner as the public lands of the United States, and the proceeds thereof be applied to the payment of said debts after deducting the expenses incident

to the management and sale thereof;" the "residue" of the *proceeds* to be paid to the State of Texas. (Benton's Abridgement, vol. 15, page 202.)

After much deliberation and debate, the resolution proposed by Milton Brown of Tennessee was adopted. It reads:

"Said *State* . . . shall retain all the vacant and unappropriated lands lying within its limits; *to be applied* to the payment of the debts and *liabilities* of the said *Republic* of Texas; and the *residue* of said lands, *after discharging* said debts and *liabilities*, to be disposed of as the *State may direct*; but in no event are said debts and liabilities to become a charge upon the government of the United States." (Benton's Abridgement, vol. 15, page 196; 1 Paschal's Digest Stat. page 44, and our Appendix.)

This "joint resolution" was a tripartite instrument, and was agreed to by the United States, by the Republic of Texas, and by the State.

That the new *State* of Texas received those vacant lands from the Republic and from the United States in trust for a particular purpose can not be doubted. It was a sacred trust for the creditors of the dying Republic.

The joint resolutions give the lands to the State "to be applied to the payment of the debts and liabilities of the *Republic*." The State is *not* to have the right to dispose of them as "the *State* may *direct*." It is only to have that power as to the "*residue*," and not until "*after* discharging said debts and liabilities" therewith.

Had these words been used by a debtor in a deed or by a testator in a will, who would have hesitated to call it a clear *trust?*

The new *State* of Texas accepted that trust.

Among the "liabilities" embraced in the joint resolutions was that to Mercer.

This was decided by both Judge Woods and Judge Pardee. Judge Woods said:

"*It* was a '*liability*' of the Republic, which held the title to lands which it had contracted to convey, and for which the consideration has been paid in full. It was as complete and binding a *liability* as a sovereign could assume. And the debates in and action of the convention of 1845, convened to frame a Constitution for the State of Texas show that these colonial contracts, including Mercer's, were regarded as *liabilities* of the Republic."

And Judge Pardee in his final opinion below said:

"That a great public *trust* was created, that the public faith was pledged, that the State of Texas may be bound in morals and good faith to *apply the public lands* as stipulated in the treaty, I agree," etc.

And Judge Pardee further decided:

"That by the compact of annexation the State of Texas assumed all the obligations, *liabilities*, and duties, including those resulting from the express trust, theretofore bearing on the Republic of Texas in relation to said contract with Mercer." (10 Federal Reporter, 324.)

The liability of the State to Mercer being a land liability, that is, a liability to convey to Mercer a section of land for each of the families settled, and other sections as premiums, and by pre-emption; "all" the vacant lands "in the limits of the State" are held in trust to be applied to its satisfaction.

The manner in which Texas has always "applied" lands in satisfaction of such land liabilities has been by its Land Commissioner issuing certificates therefor, which, when located, are to be followed by patents.

Those joint resolutions were, of course, higher than and beyond the reach of or impairment by any act of the Texas Legislature.

Yet the Land Commissioner, Walsh, has been systematically disregarding and violating that solemn compact and clouding the trust property by thousands of patents; and he threatens to continue that course until all the trust fund of "vacant lands" is dissipated.

The refusal of the court below to extend the injunction has given opportunity for millions of acres to be so disposed of; and unless the injunction be extended the complainant will be left standing in a court of equity helplessly witnessing all of the trust-fund destroyed by a minor official acting without warrant of any valid law.

The ground on which Judge Pardee refused to extend the injunction was that:

"I doubt the power and authority of the Circuit Court of the United States, sitting as a court of chancery, to enforce these obligations."

To extend this injunction is simply to prevent Walsh making way with that trust-fund. It does not injure the State; for by the terms of the Article of Annexation the State was only to have a right to

"the *residue*" of these vacant lands "*after* said debts and liabilities are paid off and discharged." As was said by Judge Woods:

"This is not a suit against the State, and does not seek to deprive her of the power of disposing of *her own* lands in her own way; for the lands which the complainant seeks to appropriate are *not the property of the State.*"

The Republic of Texas and the United States only gave to the State of Texas the "residue" of the public lands which should be left "after" satisfying Mercer and the other land liabilities.

The courts have never hesitated to protect a trust-fund from such waste by injunction.

In High on Injunctions, section 1,308, it is said:

"And it may be stated as a general rule that where public officers under color or claim of right, are proceeding to impair either public or private rights, or where their proceedings will result in serious injury to private citizens, without any corresponding benefit to the public, or where the aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed."

There is no difference in principle or power between enjoining Walsh from issuing certificates for lands within the territory embraced by the contract with Mercer, and lands within the contract of the State with the United States and the Republic.

The contract between the State and the Republic and United States is certainly of as much force as that with Mercer. The legal title to the lands within and without the colony is alike in the State. The State agreed with the Republic to hold the lands *within* the colony to be applied to the discharge of the State's liability to Mercer; and the State likewise agreed with the Republic to hold the lands *outside* of the colony to be applied to the discharge of that liability.

Both contracts were for the benefit of Mercer; and he had the right to claim the benefit of both; although not named in them.

"Where a trust is created for the benefit of a third party, though without his knowledge, he may affirm the trust and enforce its execution." (Bank vs. Guttslick, 14 Peters, 31.)

An agreement by the State to receive and hold a single acre, to be applied to the satisfaction of a liability of the Republic, and an agreement to receive and hold "*all*" the vacant lands for the same purpose, stand alike in principle. If one lot of land can be pro-

tected from depredation by officials, all can be. No trust can be too large for this court to protect.

If the articles of annexation had provided that a certain fixed tract of land—say 1,000 acres—should be received by the State and applied to the satisfaction of its liabilities, who would have doubted the power of the court to enjoin Walsh from plastering it over with patents? And does it impair the power of the court if the tract is larger?

In Davis vs. Gray, 16 Wallace, 205, the trust-fund was a belt of land in Texas 800 miles long and 16 miles wide. It was protected from official interference by an injunction against Governor Davis and Land Commissioner Kuechler.

In Penn vs. Lord Baltimore, 1 Vesey, sr. 444, the great provinces of Pennsylvania and Maryland were taken within the control of the chancellor.

The right of a creditor to protect by injunction a fund which is to be "applied" to the satisfaction of his claim, is undoubted.

High on Injunctions, sec. 1413.

It will be borne in mind that the injunction is not against the State, but only against Walsh.

It is therefore submitted that the injunction should be extended as prayed for.

It is apparent that unless this is done it will amount to a practical denial of relief to a complainant whose claim has been adjudged to be "of the highest equity and one that imperatively calls for relief."

II.

The second and third objections of Preston to the decree below will be considered together. They are, that the court erred in not extending the relief, in accordance with the prayer of the amended bill, by enjoining Walsh from further withholding from complainant the certificates and patents to which in equity he is entitled; and in not compelling, as far as practicable, an execution of the trust.

The right of the complainant being fixed, to receive 1,376 sections of land unconditionally, and to receive 1,376 sections more, on payment of $12 and $640 in Texas scrip, or its value in 1844, per section; the court should have given him practical relief.

And it was easy to do.

The Commissioner of the Land Office has full power, and indeed it is his duty, under the statutes of Texas, to issue certificates and patents to those who have land claims against Texas.

"The Commissioner of the General Land Office be and he hereby is authorized to issue to all persons and corporations such land certificates as they may be entitled to under any general or special law of the State." (Record, page 9.)

These duties of the Commissioner are purely ministerial, and can be enforced by the courts. (United States vs. Carl Schurz, 12 Otto, 379.)

It is true that the Governor also has to sign the patents, but the presumption is that he will sign them after the Commissioner prepares and signs them. If he then refuses he can be compelled to sign them by supplemental or independent proceedings.

U. S. vs. Schurz, 12 Otto, 379;
Davis vs. Gray, 16 Wallace.

The certificates should be issued to be located not alone on the lands within Mercer Colony boundaries, but on any vacant lands in the State.

Complainant is entitled to this for several reasons:

In the first place, as we have seen, the Articles of Annexation declare that those vacant lands should be so "applied," and the manner in which vacant lands are applied to the satisfaction of land liabilities in Texas has always been by the issual of certificates which can be located on any of the vacant domain.

This was obviously the mode by which the United States and the Republic expected and intended such land liabilities would be "discharged" by the "application" of these lands.

In the second place, the later statutes of Texas clearly and explicitly provided that this should be done.

The Act of August 12, 1870, provided that

"The holder of any genuine land certificate or other valid *land claim* against the State of Texas, shall hereafter have the right to locate the same upon any part of the public domain of the State," etc. (2 Paschal's Digest Statutes, page 1443; and our Appendix.)

The Act of May 16, 1871, provided that the holder of "any valid *land claim* against the State, including railroad and *colony* cer-

tificates" should have the right to locate the same on any part of the public domain." (*Ibid.*)

It is true that those acts contained a statute of limitations, in a *proviso*, that all such certificates and land claims should be located and surveyed "on or before January 1, 1875, or be forever barred;" but that proviso of limitation will not be applied in a case like this where the demand of the Texas Association for the certificates to "locate" was refused constantly; and where there was a trust relation between the parties, and where the Texas Association not only could not sue the State to establish its rights, but was, in 1873, again expressly refused the right to sue. (Record, 241.)

It is the ministerial duty of Walsh under that act to issue to complainant certificates that can be "located on any part of the public domain."

In the third place it is but *just* and *equitable* that the certificates which the complainant is entitled to under the contract should be of a character to enable him to locate on other lands than those in the boundary.

The lands within the boundary being clouded, through the fault of the State, with hostile claims, it is but equitable to allow complainant's certificates to be located elsewhere.

This was done in the following analogous cases; in which the right to have certificates issued for other lands in the place of those specifically named was based on language of grants or statutes not more explicit than the language of the Texas Compact of Annexation or the Texas Acts of 1870 and 1871 above quoted.

In U. S. vs. Clark, 16 Peters, 232, the Spanish grant was of 15,000 acres in Cedar Swamp on the west side of Little Lake, "or in others that are vacant."

The court held that this gave "an unrestricted discretion over the *entire vacant* lands of the province, to satisfy the highly meritorious claim of the petitioner."

The court permitted him to locate in an entirely different locality, and ordered patents accordingly.

The words of that grant are the exact equivalent of the words of the Mercer grant and the compact of annexation, taken together.

So taken together, Mercer's rights were, to locate his land in Mercer's Colony or in any of "the vacant and unappropriated lands in the limits of the State."

In United States vs. Sibbald the grant was of 16,000 acres in a certain place "or its equivalent." It was held to entitle Sibbald to a location elsewhere on the public domain.

The same thing was held in *ex parte* Sibbald, 12 Peters, 495, and in United States vs. Acosta, 1 Howard, 24.

In United States vs. Burlington Railroad, 98 U. S. 340, the same principle was sustained; as also in Heydenfelt vs. Daney, 93 U. S. 638, and United States vs. Watkins, 97 U. S. 223.

In all of those cases there was a particular locality granted but a provision for satisfying it in case of difficulty out of the vacant public domain; but the provisions there were not stronger than the several provisions in this case, taken together.

In so ordering certificates to be located on lands outside of the boundary the differences in value should be considered.

The proof shows that the lands within Mercer's Colony are of the average value of $5 per acre. It is "now considered the garden spot of Texas." (Record, 299, 252.)

The average value of lands outside is only a fraction of a dollar per acre. And the 10,000 or 12,000 acres left in Mercer's Colony are scrap lands, almost worthless. (Record, 259.)

To do equity, an equivalent in value should be given. In this way only can the "liability" to Mercer be "discharged" in the meaning of the compact of annexation.

Texas can not complain of this; for it has received the equal value for Mercer's lands, in cash, and in the long use of the money received.

The method for reaching this is by a mandatory injunction.

It is a settled rule in equity that where, as in this case, a right is fixed and settled, the court will not stop until it can give all the practical relief it can.

In Story's Equity Jurisprudence, sec. 959, it is said:

"Courts of equity also interfere and effectuate their own decrees in many cases by injunction in the nature of a judicial writ of execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance. Injunctions of this sort are older than the time of Lord Bacon; since in his ordinances they are treated as a well-known process. Indeed, they have been distinctly traced

back to the reign of Elizabeth and Edward the Sixth, and even of Henry VIII."

Under the original and amended bills in this case, the right of complainant to the lands and certificates having been decided, this mode of effectuating the decree should have been adopted.

In High on Injunctions, sec. 358, it is said:

"Where proceedings have been instituted in a court of equity to establish the title to real estate and a decree has been rendered that defendant make a conveyance vesting the legal title in complainant, neglect to execute such decree will warrant a mandatory injunction to deliver possession. In such cases equity proceeds upon the principle that its decree not having been complied with, operates as a conveyance, and, *the right being sufficiently established* an injunction is a proper remedy for its enforcement; otherwise complainant might be compelled to resort to proceedings in ejectment to obtain the possession to which he is already entitled by the decree, and thus be greatly delayed and embarrassed."

The reason given by the court below (Judge Pardee) for refusing this relief and for refusing to order any certificates or patents, and for refusing to have the trust executed, was that he had no *jurisdiction* to do so. He said that to do so would be in effect to decree a specific performance; and that the State as the holder of the legal title would be a necessary party therefor; and that the eleventh amendment to the Constitution forbids making the State a party. He also considered that it wonld be taking "practical possession of the Land Office of the State."

Now it is submitted that this is erroneous, and is wanting in the broad equity which the learned judge displays in other portions of the opinion.

To make the Land Commissioner issue a certificate which the State has long since agreed should be issued, and when the State has ordered the Land Commissioner shall issue all certificates to which any one is entitled, in no way requires the presence of the State as a party.

In compelling the issue of patents from the United States, it is not considered that the United States is a necessary party.

U. S. vs. Carl Schurz, 12 Otto, 379.

Suits have constantly been entertained and positive, practical relief given in such cases, where the State has been recognized as the "real

party in interest," but where the officer who has the power to act is brought into court.

Osborne vs. Bank U. S. 9 Wheaton.

U. S. vs. Custis Lee, recently decided.

The Land Commissioner of Texas is constantly being ordered by mandamus to issue land certificates to railroad companies and others who stand in the precise legal attitude of Mercer.

Railroad Co. vs. Commissioner, 36 Texas, 384.

In that case the Supreme Court of Texas did not consider that it was necessary to have the State a party, or that it was "taking possession of the Land Office," but compelled the Land Commissioner to issue the certificates.

And the court below was in error in holding that the trustee who holds the legal title is a necessary party in all cases, to a suit to execute the trust.

"If the trustee is out of the jurisdiction, or if he can not be served with process after diligent search, or if *for any reason he can not be compelled to appear*, the court will allow the suit to proceed as far as it can in the absence of such trustee." (Perry on Trusts, section 878.)

Equity can deal with *equitable* titles, and is not powerless merely because the legal title can not be controlled. It will not refuse to give all the relief it can, simply because it can not give all that could be desired. It will not let off one wrong-doer because it can not reach another.

In Whalley vs. Whalley, 1 Vernon, 487, a trust was executed without having the trustee before the court, it appearing that he had gone to parts unknown.

In Heath vs. Percival, 1 Peere Williams, 684, the court proceeded without the trustee, he not being accessible.

In Attorney-General vs. Baliol College, 9 Modern R. 409, in answer to an objection that the University of Glasgow was not a party to a proceeding, Lord Hardwicke said, "Glasgow indeed was no party, nor indeed were the plaintiffs obliged to make that university a party, for it is a corporation, and out of the kingdom and reach of process of this court, *which is always an excuse* for *not making them parties.*"

(See also Wormley vs. Wormley, 8 Wheaton, 422; Cockburn vs. Thompson, 16 Vesey, 321.)

It is therefore submitted that the court below should have commanded and compelled the respondent, Walsh, to issue to complainant certificates and patents in accordance with complainant's rights, as adjudged.

It is a settled maxim of equity that

"The power of the court to apply the remedy in the case is coextensive with its jurisdiction over the subject-matter." (Kershaw vs. Thompson, 4 Johns. Ch. 609.)

This court is respectfully asked to so extend the decree as to give full and practical relief.

GEO. M. DAVIE,
For Wm. Preston.

APPENDIX,

CONTAINING STATUTES OF TEXAS AND DOCUMENTS REFERRED TO IN THE BRIEFS OF MR. PRESTON, MR. BROWN, AND MR. DAVIE, OF COUNSEL FOR APPELLEE.

No. 1.

ACT OF JANUARY (FEBRUARY) 4, 1841.

Hartley, p. 624.

An Act granting Land to Emigrants.

Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That every head of a family who has emigrated to this Republic, since the first of January, one thousand eight hundred and forty, or who may emigrate before the first of January, one thousand eight hundred and forty-two, with his family, and who is a free white person, shall be entitled to six hundred and forty acres of land; provided he settle and actually reside on the same for the term of three years, and cultivate an amount of the same, not less than ten acres; and further provided, he shall have his land surveyed and plainly marked, so as to include his improvements.

Sec. 2. Be it further enacted, That each single man over the age of seventeen, who has or may emigrate as provided in the first section of this act, shall be entitled to three hundred and twenty acres of land upon the same conditions and restrictions as the heads of families.

Sec. 3. Be it further enacted, That in no instance shall a patent be issued under the provisions of this act, unless the party produce the official certificate of the Chief Justice of the county where he may reside, that he, the said applicant, has proven by two respectable and creditable witnesses that he has resided on the land for which he wishes to receive a patent, and that he has cultivated the quantum of land

required by this act for the term of three years, and that he has done and performed all the duties required of other citizens, and that he has taken the oath of allegiance to this Republic; provided, always, the applicant shall be required to make oath or affirmation, that he has complied with the requisitions of this act, which oath or affirmation shall be properly authenticated.

Sec. 4. Be it further enacted, That the President of the Republic be, and he is hereby authorized, to make a contract with W. S. Peters, Daniel S. Carroll, Alexander M'Red, Rowland Gibson, Robert Espie, Wm. H. Oldmixon, Daniel Spillman, Robert Hume, John Salmon, W. Byrne, Henry Richards, Robert D. Stringer, W. C. Peters, John C. Banseman, John Peters, Wm. Scott, Phineas J. Johnson, H. S. Peters, Timothy Cray, and Samuel Browning, collectively, for the purpose of colonizing and settling a portion of the vacant and unappropriated lands of the Republic, on the following conditions, to wit: the said contractors, on their part, agree to introduce a number of families, to be specified in the contract, within three years from the date of the contract; provided, however, they shall commence the settlement within one year from the date of said contract.

Sec. 5. Be it further enacted, That the said contract shall be drawn up by the Secretary of State, setting forth such regulations and stipulations as shall not be contrary to the general principles of this law and the Constitution, which contract shall be signed by the President and the party or parties, and attested by the Secretary of State, who will also preserve a copy in his department.

Sec. 6. Be it further enacted, That the President shall designate certain boundaries, to be above the limits of the present settlements, within which the emigrants under the said contract must reside; provided, however, that all legal grants and surveys that may have been located within the boundaries so designated previously to the date of said contract, shall be respected, and any locations or surveys made by the contractors or their emigrants on such grants and surveys shall be null and void.

Sec. 7. Be it further enacted, That not more than one section of six hundred and forty acres of land, to be located in a square, shall be given to any family, comprehended in said contract, nor more than three hundred and twenty acres to a single man over the age of seventeen years.

Sec. 8. Be it further enacted, That no individual contract made

between any contractor and the families or single persons which he may introduce for a portion of the land to which, respectively, they may be entitled by way of recompense for passage, expense of transportation, removal, or otherwise, shall be binding if such contract embrace more than one half of the land which he, she, or they may be entitled to under this law; nor shall any contract act as a lien on any larger portion of such land, nor shall any emigrant be entitled to any land, or receive a title for such land until such person or persons shall have built a good and comfortable cabin upon it, and shall keep in cultivation and under good fence at least fifteen acres on the tract which he may have received.

Sec. 9. Be it further enacted, That all the expenses attending the selection of the land, surveying, title, and other fees, shall be paid by the contractor to the persons respectively authorized to receive them; provided, however, that this provision shall not release the colonists from the obligation of remunerating the contractor in the amount of all such fees, so soon as it can be done without a sale of their land; and, further, the President may donate to every settlement of one hundred families, made under the provisions of this act, one section of six hundred and forty acres of land, to aid and assist the settlement in the erection of a building for religious public worship.

Sec. 10. Be it further enacted, That the President may allow the contractors a compensation for their services, and in recompense of their labor and expense attendant on the introduction and settlement of the families introduced by him, ten sections for every hundred families, and in the same ratio of half sections for every hundred single men introduced and settled, it being understood that no fractional number, less than one hundred, will be allowed any premium.

Sec. 11. Be it further enacted, That the premium lands must be selected from the vacant lands within the territorial limits defined in the contract; and further, all fees incidental to the issue of patents for lands acquired under the provisions of this law, shall be paid to the Commissioner of the General Land Office for the use and benefit of the public treasury.

Sec. 12. Be it further enacted, That a failure on the part of the contractors, and a forfeiture of their contract, shall not be prejudicial to the rights of such families and single persons as they may introduce, who shall be entitled to their respective quotas of land, agreeably to the provisions of this law.

Sec. 13. Be it further enacted, That the contractors shall be required to have one third of the whole number of the families and single persons for which they contract, within the limits of the Republic before the expiration of one year from the date of the contract, under the penalty of a forfeiture of the same, and it shall be the duty of the Secretary of State forthwith after the expiration of such term, and failure on the part of the contractors to comply with this provision, to publish and declare said forfeiture, unless the President, for good and sufficient reasons, shall extend the term six months, which he can do; and all substitutions of families living within the limits of the Republic, by the contractors, shall not entitle them to any premium for such families, nor shall it operate in favor of them for the number of families which they are bound to introduce; and this act shall take effect from and after its passage.

No. 2.

SUPPLEMENTARY ACT OF FEBRUARY 5, 1842.

Hartley, p. 645.

An Act amendatory of "An Act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one.

Article 2087. [1]. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the provisions of an act entitled "An act granting Land to Emigrants," approved January fourth, one thousand eight hundred and forty-one, so far as relates to the authority thereby given to the President to enter into a contract with W. S. Peters and others to introduce colonists upon certain terms therein expressed and set forth, be and the same are hereby extended to such other company, or companies, which may be organized for like purposes, as the President may in his judgment approve.

Art. 2088. [2]. Be it further enacted, That all the rights accruing to said company by the provisions of said act, and all the duties, obligations, and conditions imposed by the same upon the said W. S. Peters and his associates, be and the same are hereby extended to such other companies as may be organized under the provisions of this act.

No. 3.

ACT OF JANUARY 16, 1843.

Hartley, p. 649.

Joint Resolution to modify the provisions of an Act entitled "An Act granting Land to Emigrants.

Article 2103. Whereas, by an act passed by the Congress of Texas, entitled, "An act granting land to emigrants," and bearing date the fourth day of February, 1841, a grant was made to Daniel Joseph Carroll, Henry J. Peters, and others, their associates, therein named, for the introduction and settlement of emigrants within the territory of this Republic, and upon the terms and conditions therein provided; and whereas, by said act, the President of this Republic was authorized to make a contract with said Daniel J. Carroll, Henry J. Peters, and their associates aforesaid, collectively, in conformity with the provisions of the same; and whereas, in pursuance of such authority, the President did make a contract with the aforesaid grantees, which was duly executed in their behalf, by their attorney, Samuel Browning, and which bears date the thirtieth day of August, 1841; and whereas, the President did make a further contract with the same parties, which bears date the twentieth day of November, 1841; and whereas, the President did make a yet further contract with the same parties, through their attorney, Horace Burnham, which bears date the twenty-sixth day of July, 1842, said last two contracts being supplementary to and making one with the said first contract; and whereas, it is deemed expedient to modify some of the provisions of said act and contracts, and to extend some of the privileges therein granted; now, therefore,

Resolved, by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the President be, and he is hereby authorized and required to make such modification of the aforesaid contracts, or such further contract or contracts, with the grantees named in the aforesaid act, or with their assigns or legal representatives, as shall be deemed by him for the benefit of this Republic, and as shall not be inconsistent with the provisions of the said act:

Provided, however, That he shall have full power and authority to extend the time to the grantees named in the aforesaid act, or to

their assigns or legal representatives, for the introduction and settlement of emigrants in this Republic, to a period not exceeding five years from the first day of July next; and that he shall be authorized to prescribe the limits within which the grantees or their assigns or legal representatives shall be permitted to introduce and settle any number of families, not exceeding ten thousand, within the whole time limited; that he shall be authorized to make the title and conveyance of each section of six hundred and forty acres of land which has been or shall be acquired under any contract made or to be made, by the President of this Republic, with the grantees or their assigns, or legal representatives, to the said grantees or their assigns, or legal representatives, direct: *Provided*, That said grantees, their assigns or legal representatives, shall survey the land assigned to them, as provided in the act aforesaid; and shall be required to settle or receive such lots only as are of fair quality for agricultural purposes; and not too far situated in the interior of a prairie for such purposes, whenever they shall have completed the surveys of any number of sections, and built a corresponding number of small, comfortable houses, or cabins of logs or other materials, thereon, and placed families therein, they shall receive a title from this government to one section of six hundred and forty acres for each family so introduced and settled; and shall be required to immediately convey to the legal representative of said family, not less than one hundred and sixty, nor more than six hundred and forty acres of said land: conditioned that said family shall remain upon said land so conveyed, and enclose with fence and cultivate fifteen acres, for at least three years; and in default thereof, shall forfeit the same to this Republic.

Provided, further, That in the contract to be made by the President of this Republic with the said grantees, or with their assigns, or legal representatives, they shall be required to settle each year, within the territory prescribed, or to be prescribed to them, at least two hundred and fifty families, reckoning from and after the first day of July next, and including the families which shall then have been settled on the tract prescribed; and in default of introducing and settling such number of families, their contract shall be forfeited.

Provided, however, That they shall be allowed to introduce and settle any number of families, not exceeding ten thousand in all, on the same terms and conditions; and,

Provided, further, That they shall be permitted to settle all the sections within any limits prescribed, or to be prescribed, and not located previous to the time of defining such limits; and that for every alternate section of six hundred and forty acres which shall be conveyed to them, they shall pay into the treasury of this Republic twelve dollars in specie, on receiving the title from the government; and,

Provided, further, That in case of forfeiture, the party shall only be affected prospectively, any thing in the aforesaid act, or contracts, to the contrary notwithstanding:

Provided, further, That the Cherokee lands shall be exempt from the provisions of this act.

No. 6.

ACT OF JANUARY 30, 1844.

Hartley, p. 652.

An Act to repeal all laws now in force authorizing the President to form Colonization Contracts, and to forfeit such as have already been made, where the conditions have not been strictly complied with.

Article 2110. [1] Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, that all laws now in force, authorizing the President to make contracts with individuals, or companies, for the purpose of colonizing and settling portions of the unappropriated lands of the Republic, be, and the same are hereby, repealed.

Art. 2111. [2] Be it further enacted, That all such contracts, already made, the conditions of which have not been strictly and rigidly complied with, or hereafter fail to be complied with, are hereby declared forfeited; and no extension of time or privilege shall be granted to said contractors for the purposes of carrying such contracts into effect.

Art. 2112. [3] Be it further enacted, That no further contract or contracts shall be made by the President with such individuals, who have already made contracts for the purposes above specified, whereby any further time, privileges, or facilities may be granted to said contractors; and the "Joint Resolution to modify the provisions of an act entitled 'An act granting land to emigrants,' approved January

16, 1843," so far as the same relates to any prospective action of the President, in regard to modifying said contracts, or extending the time as now embraced in said contracts, whereby the privileges of said company, or their assigns or representatives, mentioned in said joint resolution, may be increased, be, and the same is hereby, repealed.

Art. 2113. [4] Be it further enacted, That it shall be the duty of the Attorney-General, under the directions of the President, to ascertain as fully as possible, all the proceedings of said contractors, how far they have complied with their conditions, and in what respects they have failed, and report fully on said subject to the next Congress of the Republic, in order that they may take such further action thereon as they may think proper.

Art. 2114. [5] Be it further enacted, That it shall be the duty of the President, whenever he ascertains that any of the colonization contracts heretofore made, have been forfeited by a failure to comply with all their provisions, on the part of the contractors, to issue his proclamation to that effect, immediately.

No. 7.

JOINT RESOLUTION OF FEBRUARY 3, 1845.

Hartley, p. 660.

Joint Resolution to establish the limits of the Mercer Colony.

Article 2145. [1] Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That General Charles Fenton Mercer and his associates be, and they are hereby, required to have the lines of their colony land actually surveyed and marked by the first day of April next.

Art. 2146. [2] Be it further resolved, That a failure to comply with the provisions of the above section, shall work a forfeiture of their contract.

Art. 2147. [3] Be it further resolved, That no person shall be recognized as provided for in said contracts, who were not specially introduced by the said contractors, so far as the premium lands are concerned; but the citizens so introduced shall be entitled to the same amount of land as though they had been introduced as provided for in said contract; and that this act take effect from and after its passage.

No. 8.

JOINT RESOLUTION U. S. CONGRESS, MARCH 1, 1845.

Hartley, p. 44; 5 U. S. Stat. at Large, p. 797.

Joint Resolution for annexing Texas to the United States.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports, and harbours, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provis-

ion of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery or involuntary servitude (except for crime) shall be prohibited.

3. And be it further resolved, That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the government of Texas and the United States; and that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate or by articles to be submitted to the two houses of Congress, as the President may direct.

Approved March 1, 1845.

No. 9.

JOINT RESOLUTION OF CONGRESS OF REPUBLIC OF TEXAS, JUNE 23, 1845.

Hartley, p. 46.

Joint Resolution giving the consent of the existing Government to the annexation of Texas to the United States.

Whereas, The government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State,

to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the first and second sections of the resolution of the Congress of the United States, of March 1, 1845, *supra.*]

And, whereas, By said terms, the consent of the existing government of Texas is required; therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the preamble to this joint resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May 5, 1845, and the election of deputies to sit in convention at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the government of the United States, through their accredited minister near this government, with a copy of this joint resolution; also to furnish the convention to assemble at Austin, on the fourth of July next, a copy of the same. And the same shall take effect from and after its passage.

Approved June 23, 1845.

No. 10.

ACT OF JUNE 25, 1845.

Hartley, p. 662 *Arts.* 2151, 2152.

An Act requiring the Commissioner of the General Land Office to issue patents in certain cases.

Art. 2151. [1] That the Commissioner of the General Land Office be, and he is hereby, authorized and required to issue patents to all persons otherwise legally entitled to the same, notwithstanding the

lands for which said patents are or may hereafter be demanded may be within the limits designated in the colonization contract made on the twenty-ninth day of January, one thousand eight hundred and forty-four, between Sam Houston, then President of the Republic of Texas, acting in behalf of the Republic, and Charles Fenton Mercer and his associates, *provided*, the locations or surveys, in pursuance of which said patents are or may be demanded, were filed in the office of county surveyor, in which said lands may be, or made by his direction, previous to notice to said surveyor of the existence and territorial limits of said contract of colonization; *provided further*, that nothing herein contained shall be so construed as to declare that any certificate located within any colony limits, is not as valid as if located upon any of the vacant domain of the Republic.

Art. 2152. [2] The official certificate or certificates of said surveyor or surveyors, shall be sufficient evidence to the Commissioner of the General Land Office of the receipt of said information or notice by said surveyor or surveyors, in the first section of this act mentioned.

"AN ORDINANCE."

"Whereas, various contracts have been entered into by the President of the Republic of Texas, with divers individuals, with the expressed intention of colonizing an enormous amount of the public domain of Texas; and

"Whereas, it is believed that said contracts were unconstitutional, and therefore void from the beginning, and if carried out would operate as a monopoly of upwards of seven millions of acres of the public domain of Texas, in the hands of a few individuals—when, in truth, the citizen soldiers and creditors of the Republic of Texas, had, by the laws and constitution of said Republic, a clear and indisputable previously subsisting right to locate upon the public domain thus attempted to be assigned to said contractors:

"Sec. 1. Therefore it is hereby ordained and declared, That it shall be the duty of the attorney general of this State, or the district attorney of the district in which any portion of the colonies may be situate, as soon as the organization of the State shall be completed, to institute legal proceedings against all colony contractors who have entered into contracts with the President of Texas; and if upon such

nvestigation, it shall be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed null and void; provided, however, that all actual settlers under any such contract shall be entitled to their quantity of land as colonists—not to exceed six hundred and forty acres to the head of a family, and three hundred and twenty acres to a single man. And in all suits brought by or against any contractors, or any person claiming under, by, or through them, or either of them, it shall be lawful for the adverse claimant to set forth any plea that it would have been competent for the State to plead; and the party may introduce testimony to prove the claim or title to have been forfeited, as well for frauds, or illegality, or unconstitutionality, as on account of a failure to comply with the conditions of the original grant or contract; and any such pleas shall be deemed good and valid in law, in all such suit or suits in this State.

"Sec. 2. Be it further ordained, that the legislature is hereby restrained from extending any contract for settling a colony, and from relieving any contractor from the failure of the conditions, or the forfeiture accruing from non-compliance with the contract.

"Sec. 3. And be it further enacted, That this ordinance shall be presented to the people for their adoption or rejection, at the same time that this constitution shall be presented to them, and the returns of the votes taken on this ordinance shall be made to the office of the Secretary of State of the Republic of Texas, at the same time the votes for the constitution may be returned.

"Adopted in convention, this twenty-seventh day of August, one thousand eight hundred and forty-five.

"Attest: "THOS. J. RUSK, *President.*

"JAMES H. RAYMOND,

"*Secretary of the Convention.*"

No. 14.

ACT OF MAY 11, 1846.

Hartley, p. 104.

An Act defining the duties of the Attorney General of the State of Texas.

Art. 77. [13] *Be it further enacted,* That it shall be the duty of the Attorney General of this State to file the petition or information, and

institute legal proceedings against all colony contractors who have entered into contracts with any President of the Republic of Texas; which proceedings may be commenced in any district court for any county where the whole or any portion of territory embraced in any colony may be situate.

No. 15.

ACT OF FEBRUARY 2, 1850.

Hartley, p. 702.

An Act for the relief of the citizens of Mercer's Colony.

Art. 2309. [1] *Be it enacted by the Legislature of the State of Texas*, That every colonist, or the heirs or administrators of such colonists, citizens of the colony of Charles Fenton Mercer and his associates, on the twenty-fifth of October, 1848, shall receive the quantity of land to which such colonists may be entitled, to wit, six hundred and forty acres to each family, and three hundred and twenty acres to each single man over the age of seventeen years; *provided*, that nothing herein contained shall be construed so as to place the contractors of said colony in a better condition in regard to the State of Texas than they would be if this law had not been passed.

Art. 2310. [2] That the Governor, by and with the advice and consent of the Senate, shall appoint a commissioner, whose duty it shall be to hear proof and determine what colonists shall be entitled to land as aforesaid; and said commissioner shall issue to parties entitled to the same, or to the heirs or legal representatives of such parties, certificates for their proper quantity of land.

Art. 2311. [3] That the owners of said certificates may locate, transfer, or donate the same, and exercise all rights of ownership over them.

Art. 2312. [4] That said certificates may be located on any vacant land within the limits of said colony not otherwise appropriated, as other headright certificates are located; and the same laws relative thereto shall govern the surveyors and other officers in the discharge of their official duties in relation to the surveying, recording, etc., of the same.

Art. 2313. [5] That no change shall be made in the boundaries of the surveys of settlers, whether they be with or without the consent

of the contractors, so that the boundaries thereof are justly and definitely marked.

Art. 2314. [6] That should the commissioner appointed under the second section of this act fail or neglect to act, or should the office in any manner become vacant, the Governor is hereby authorized and required to fill such vacancy by appointing some competent person to perform the duties herein required as soon as practicable.

Art. 2315. [7] That the commissioner appointed in compliance with this act shall receive two dollars for each certificate issued, to be paid by the party receiving the same; and said commissioner shall do and transact the business and duties required of him at the different county seats of each and every county within the limits of said colony.

Art. 2316. [8] That to entitle the colonists to the benefits of this act, they shall be required to prove by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas and became citizens of said colony prior to the twenty-fifth of October, 1848; that they are citizens thereof; that they have performed all the duties required of them as citizens; and said applicants shall also swear that they have never received any land of this government by virtue of their emigration hither; *provided*, that they shall not be required to prove that they have cultivated land.

Art. 2317. [9] That to entitle the heirs and legal representatives of such citizens as have died subsequently to their citizenship, within the limits of said colony, to the benefits of this act, the proof and requirements shall be the same as in the foregoing, except the oath; instead of which there shall be substituted the oath of the heirs and legal representatives of such citizens, testifying to the best of their knowledge and belief to the truth of the facts herein required to be proven.

Art. 2318. [10] That upon the presentation of said certificate, with the proper field-notes of the surveyor, made in accordance with the law, the Commissioner of the General Land Office shall issue the patents accordingly, to all who may be entitled to the same.

Art. 2319. [11] That it shall be the duty of the commissioner appointed by virtue of this act, to send to the Commissioner of the General Land Office, a monthly list, under oath, containing a description of certificates issued in compliance with this act; and he shall also keep a record in a well-bound book, showing the quantity of land

for which each certificate issued, the names of the parties obtaining the same, and the names of the witnesses who made the proof; and said commissioner shall deposit said record-book in the General Land Office, at the expiration of the time limited in this act for granting certificates.

Art. 2320. [12] That the commissioner appointed by virtue of this act, before he enters upon the duties of his office, shall give bond in the sum of twenty thousand dollars, with security to be approved by the district judge of the ninth judicial district, which bond shall be drawn payable to the State of Texas, and shall be conditioned that the commissioner shall faithfully and impartially discharge the duties imposed on him by this act; and shall also take the oath required by the Constitution, which oath shall be endorsed on the said bond, and with the same shall be deposited in the office of the Secretary of State.

Art. 2321. [13] That said commissioner shall continue to perform the duties imposed on him by this act for and during the term of eighteen months from and after his appointment as aforesaid, and no longer.

Art. 2322. [14] That in case the claim of any individual be rejected by said commissioner, such claimant shall have the right to appeal to the District Court of the county where he or she applied, under the rules and regulations governing appeals from Justices' Courts to the District Courts, except that the appeal-bond be required only to cover the costs of appeal; and in case the judgment be affirmed, the appellant shall pay all costs; and in case the judgment be reversed, the claimant shall be entitled to a certificate from the clerk of the District Court, for which he shall pay to the clerk of the court two dollars; which certificate shall entitle the owner to all the right to which he would have been entitled under a certificate from the commissioner aforesaid.

No. 16.

ACT OF CONGRESS U. S., SEPTEMBER 9, 1850.

U. S. Statutes, p. 446.

An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a Territorial Government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas: *Provided*, The said agreement by the said general assembly shall be given on or before the first day of December, eighteen hundred and fifty:

First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the

end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Fifth. Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also,* That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided,* That nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the "joint resolution for annexing Texas to the United States," approved March 1, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise.

No. 17.

ACT OF NOVEMBER 25, 1850.

Paschal's Digest, p. 193.

An Act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by her Exterior to said Boundaries and of all her Claims upon the United States, and to Establish a Territorial Government for New Mexico."

Article 443. Whereas, said propositions are contained in the first section of said act in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States.

and upon the said State of Texas: *Provided*, The said agreement by the said General Assembly shall be given on or before the first day of December, eighteen hundred and fifty:

Art. 444. [1] The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and shall run from said point due west to the meridian of 103 degrees west from Greenwich; thence her boundary shall run due south to the 32d degree of North latitude; thence on the said parallel of 32 degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the gulf of Mexico.

Art. 445. [2] The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Art. 446. [3] The State of Texas relinquishes all claim upon the United States for liabiiity of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

Art 447. [4] The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

Art. 448. [5] Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided, also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States: *Provided*, That

nothing herein contained shall be construed to impair or qualify any thing contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise; therefore,

Art. 449. [1] That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

Art. 450. [2] That the Governor of this State be, and he is hereby requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress.

No. 18.

ACT OF JANUARY 24, 1852.

Pamphlet Laws, Chapter lxv., p. 35.

An Act for the Relief of the Settlers in the Territory commonly known as Mercer's Colony.

Section 1. Be it enacted by the Legislature of the state of Texas, that the Commissioner of the General Land Office is hereby required to issue patents upon all surveys made by virtue of certificates issued to settlers as colonists in the territory commonly known as Mercer's Colony, under the same terms and conditions as required by law in other cases; *provided*, that no such certificate shall be located without the limits of the territory generally known as Mercer's Colony, prior to the rendition of the decree of twenty-eighth day of October, A. D. eighteen hundred and forty-eight, by the District Court of Navarro county; *provided*, that nothing contained in this act shall be so construed as to recognize any right of the contractors of said colony to any lands therein, on account of said contract or rights growing out of the same.

Art. 2. That this act shall take effect from its passage.

Approved January 24, 1852.

No. 19.

ACT OF FEBRUARY 16, 1852.

Pamphlet Laws, p. 136.

An Act Supplementary to and Amending an Act for the Relief of Citizens of Mercer's Colony, of date February 2, 1850.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That section eight of the above recited act be so amended that it shall only be necessary for the colonists applying for lands to prove that they were resident citizens of said colony January 29, 1849, but in all other respects they shall fully comply with the provisions of said eighth section of said act.

Sec. 2. That the proof required by the first section of this act shall be made before the district court of the county in which the party resided January 29, 1849; and it shall be the duty of the district court to hear and determine, and award or refuse certificates to the parties applying under the provisions of this act, and the act to which this act is supplementary, in the same manner as the commissioner appointed under said act might or should have done under the same.

Sec. 3. That no petition shall be required, and it shall only be necessary for the clerk of said court, upon the application of the party desiring to avail himself of the provisions of this act, to enter the name on the applicant on his docket, and the said application shall be heard in its order as other cases upon the docket, unless the court shall appoint some particular day of the term for hearing the same.

Sec. 4. That the certificates for the claims established under this act shall be issued by the clerk and be countersigned by the judge of the court issuing the same, and of the issues of said certificates the clerk shall make monthly returns to the Commissioner of the General Land Office; in no case shall the clerk's fees be more than three dollars, and he shall be entitled to said fees from the applicant should he fail or succeed in his application.

Sec. 5. That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March 23, 1850, shall apply and be of force in regard to all rights sought to be established, and all certificates issued under the provisions of this act, except in the amendment

provided for by the first section of this act; *provided*, not more than twenty certificates shall be proven up.

Sec. 6. That this act take effect from and after its passage.

Approved February 16, 1852.

No. 20.

ACT OF JANUARY 21, 1854.

Pamphlet Laws, p. 9.

An Act supplementary to An Act supplementary to and amending "An Act for the relief of the citizens of Mercer's Colony," of date February second eighteen hundred and fifty.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That the provisions of the act for the relief of the citizens of Mercer's Colony, of effect March twenty-third, eighteen hundred and fifty, shall apply and be in force in regard to all rights sought to be established, and all certificates issued under the provisions of the act to which this is a supplement, *provided*, that no certificate shall be granted or issued under the provisions of this act, or the act to which this is a supplement, unless the applicant shall make all the proof required by the above recited act, and shall also prove, by his or her own oath, supported by the oath of two respectable witnesses, that he, or his or her ancestors or decedents, as the case may be, emigrated to and settled with the limits of the territory commonly known as Mercer's Colony, on or before the twenty-ninth day of January, A. D. eighteen hundred and forty-ninth; and should any certificate be obtained by fraud or perjury, or otherwise than according to the true intent and meaning of this act, such certificate, and the patent issued thereon, shall be utterly void.

Sec. 2. That the fifth section of an act supplementary to and amending an act for the relief of the citizens of Mercer's Colony, of date sixteenth of February, eighteen hundred and fifty-two, be and the same is hereby repealed; and that this act take effect from and after its passage.

Approved January 21, 1854.

No. 21.

ACT OF DECEMBER 17, 1857.

Pamphlet Laws, p. 21.

An Act to repeal an Act supplementary to an Act for the Relief of the Citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856.

Section 1. Be it enacted by the Legislature of the State of Texas, That an act supplementary to an act for the relief of the citizens of Mercer's Colony, passed February 2, 1850, approved August 30, 1856, be and the same is hereby repealed; *provided*, that the passage of this act shall not in any way affect the right of parties who have received certificates for land from any district court under the provisions of the act hereby repealed.

Sec. 2. That this act take effect and be in force from and after its passage.

Approved December 17, 1857.

ACT OF FEBRUARY 28, 1855.

U. S. Statutes, vol. 10, chap. 129, p. 617.

An Act to provide for the Payment of such Creditors of the late Republic of Texas as are comprehended in the Act of Congress of September nine, eighteen hundred and fifty.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That in lieu of the sum of five millions of dollars, payable to the State of Texas, in five per cent. stock of the United States, by the act entitled "An act proposing to the State of Texas the establishment of her Northern and Western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico," passed September ninth, eighteen hundred and fifty, the issuing of which stock was restricted by the first proviso to the fifth proposition contained in the first section of said act, the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the creditors of the late Republic of Texas, who hold such bonds, or other evidences of debt for which the revenues of

that Republic were pledged, as were reported to be within the provisions of the said act of September the ninth, eighteen hundred and fifty, by the report of the late Secretary of the Treasury to the President of the United States, and approved by him on the thirteenth day of September, eighteen hundred and fifty-one, or which come within the provisions of said act, according to the opinion upon the Texas compact of the present Attorney General of the United States, addressed to the Secretary of the Treasury, under date of September twenty-sixth, eighteen hundred and fifty-three, the sum of seven millions seven hundred and fifty thousand dollars, to be apportioned among the said holders pro rata: *Provided*, That the interest on the debt, embraced in this act, shall be determined by the existing laws of the State of Texas.

Sec. 2. And be it further enacted, That in all cases where the State of Texas may have paid any portion of the debt described in this act, the said secretary shall refund to the proper officer of said State the amount actually so paid by the State, upon the presentation at the Treasury Department of the evidences of said debt, on which the said State may have made such payment: *Provided*, The said sum shall not exceed the proportion which would have been allowed to the creditor or creditors, if such payment on said evidences of debt had not been made by the State of Texas; and where the said sum that may be refunded to the State of Texas by the provisions of this section is less than the proportion which would have been allowed under this act to the holders of such evidences of debt, had such payment not been made them, such holders shall be entitled to receive the difference between said sum and the proportion they would have received under this act if no payment had been made them; and where any original certificates or other evidences of debt have been surrendered to the authority of the State of Texas, and new certificates issued therefor by said State of Texas, such new certificates shall be received as evidences of the original amount of the claim.

Sec. 3. And be it further enacted, That no payment shall be made under this act, to any holder of said securities, or evidences of debt, unless the said holder shall first execute to the United States a receipt for the said payment, in which said holder shall forever release all claim against the United States for or on account of the said securities, or evidences of debt; also, similar releases to said State of Texas; and the said certificates, or other evidences of debt, shall then be deposited with the Treasury Department.

Sec. 4. And be it further enacted, That before payment of the moneys aforesaid, the Secretary of the Treasury shall give notice, by public advertisement, for the space of ninety days, of the time at which said payment will be made; and no payment shall be made on any bond, certificate, or evidence of debt, which shall not, thirty days before the time limited by said notice, be presented at the Treasury Department.

Sec. 5. And be it further enacted, That the sum of seven millions seven hundred and fifty thousand dollars be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, for the purpose of carrying into effect the provisions of this act.

Sec. 6. And be it further enacted, That this act shall not take effect until it shall be assented to by an act of the legislature of the State of Texas, and a copy of the act of said State, duly authenticated, deposited in the Treasury Department at Washington, nor until the legislature of the State of Texas shall pass an act withdrawing and abandoning all claims and demands against the United States, growing out of Indian depredations or otherwise.

Approved, February 28, 1855.

"G."

ACT AUGUST 12, 1870.

2 Paschal's Digest Statutes, p. 1443.

Section 5. "The holder of any genuine land certificate, or other valid land claims against the State of Texas, shall hereafter have the right to locate the same upon any part of the public domain of the State not subject to the claim of actual occupants, as prescribed in the foregoing sections of this act, and in accordance with the laws now in force in reference to the location, surveying, and patenting of lands in this State; *provided*, that all such certificates shall be located, surveyed, and returned to the general land office by the first day of January, eighteen hundred and seventy-five, or be forever barred.

G. 1.

ACT OF MAY 16, 1871.

2 Paschal's Digest Statutes, p. 1443

Section 3. Section five of the aforesaid act, approved August 12 1870 [shall] be so amended as to read in the following words, to wit The holder of any genuine land certificate or other valid land claim against the State, including railroad and colony certificates, and al other certificates that have not been declared void by some competen authority, shall have the right to locate the same on any part of the public domain of the State, not included in any railroad reservation, nor in any State section of land surveyed by virtue of any railroad certificate, nor upon any island, and not subject to the claims of actual occupants, and have the same surveyed and patented in accordance with existing laws; *provided*, that all such certificates and land claims shall be located, surveyed, and returned to the general land office by or before the first day of January, A. D. eighteen hundred and seventy-five, or be forever barred.

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Index of Points and Authorities for Wm. Preston.

1. The general policy and laws of Texas for obtaining inhabitants by colony contracts.

1 Paschal's Digest Texas Statutes, pages 206 to 254.
Opinion on Texas Colonization Contracts, 8 Att'y Gen. Opin., 533.

2. The Mercer Colony contract of January 29th, 1844 was constitutional and valid.

1 Paschal's Digest Texas Statutes, pages 234, 235.
1 Paschal's Digest Texas Statutes, page 156.
Melton *v.* Cobb, 21 Texas, 539.
Bryan *v.* Sherley, 53 Texas.

3. That contract was a "contract" in the constitutional sense; which could not be subsequently impaired by Texas.

Green *v.* Biddle, 8 Wheaton, 92.
Hamilton *v.* Flinn, 21 Texas, 716.
8th Opinions Att'y Gen., 530.
Hall *v.* Wisconsin, 103 U. S., 5.

4. That contract by its terms created and made a "reservation" of the lands within "Mercer's Colony;" and the State and its officers were thereby forbidden to subsequently convey those lands to others.

Melton *v.* Cobb, 21 Texas, 543.
Wilcox *v.* Jackson, 13 Peters, 498.
Leavenworth *v.* R. R., 2 Otto, 741, 745.
State *v.* Delesdenier, 7 Texas, 108.
Kimmel *v.* Wheeler, 22 Texas, 77.
Fowler *v.* Allred, 24 Texas, 167, 184.
Johnson *v.* Towsley, 13 Wallace, 85.
Wirth *v.* Bransom, 98 U. S., 121.

5. That contract created an *express trust* for the benefit of Mercer and his associates, under which Mercer and his associates became the equitable owners and the Republic of Texas the holder of the legal title as their trustee.

Perry on Trusts, secs. 24, 41, 82.
Strother *v.* Lucas, 12 Peters, 436.
Yosemite Valley Case, 15 Wall., 77.

6. The trust passed to the State of Texas when the Republic ended, and the State became trustee.

N. O. *v.* U. S., 10 Peters, 736, 737.
U. S. *v.* Smith, 10 Peters, 331, 335.
Soulard *v.* U. S., 4 Peters, 512.
N. O. *v.* DeArmas, 9 Peters, 236.
Lessees of Pollard *v.* Kibbe, 14 Peters, 390.

7. It was a grant *in presenti*, creating a vested interest, as in cases of railroad grants of alternate sections on such roads as may be thereafter built, under which "the *title passed* to the sections to be afterwards located."

Schulenberg *v.* Harriman, 21 Wall., 60.
Fremont *v.* U. S., 17 How., 559.
U. S. *v.* Hornsby, 10 Wall., 233.
Leavenworth R. R. *v.* U. S., 92 U. S., 741.
Mo. R. R. *v.* Kan. R. R., 97 U. S., 497.
Railway *v.* Alling, 99 U. S., 475.
Wood *v.* R. R., 104 U. S., 332.
Grinnel *v.* R. R., 103 U. S., 742.

8. A grant of a smaller portion out of a larger described boundary is valid and operates to create a vested estate.

U. S. *v.* Fremont, 17 How., 559.
U. S. *v.* Hornsby, 10 Wall., 233.

9. The obligations and undertakings of Mercer under the contract were all to be performed *subsequently*, and there were no conditions *precedent*.

Todd *v.* Fisher, 26 Texas, 241.
Ledyard *v.* Brown, 27 Texas, 403.
U. S. *v.* Rodman, 15 Peters, 139.
U. S. *v.* Arredondo, 6 Peters, 745.
Fremont *v.* U. S., 17 How., 542.
Hancock *v.* McKinney, 7 Texas, 454.
Davis *v.* Gray, 16 Wall.
Emigrant Co. *v.* County, 100 U. S., 70.

10. There was no provision in the contract forfeiting Mercer's rights for failure to perform conditions, and no right to forfeit will be implied in such contract.

U. S. *v.* Rodman, 15 Peters, 139.
Todd *v.* Fisher, 26 Texas, 246.
Emigrant Co. *v.* County, 100 U. S., 70.

11. There was no failure on the part of Mercer to perform his agreements.

Melton *v.* Cobb, 21 Texas, 543.
And various legislative acts, reports, proofs, &c., &c.
Com'r Crockett's Judgments, Record, 116 to 142.

12. If there had been any failure on the part of Mercer to perform any conditions, the obstructions and interferences by the State and its officials, and the change of government, &c., &c., was a sufficient excuse to prevent forfeiture.

U. S. *v.* Arredondo, 6 Peters.
U. S. *v.* Reading, 18 Howard, 6.
U. S. *v.* Fremont, 17 Howard.
U. S. *v.* Vaca, 18 Howard, 556.
Davis *v.* Gray, 16 Wallace.
Arlington Cases, recently decided.

13. Non-performance of conditions does not *per se* forfeit in Texas; but there must be a proclamation by the President, or a judicial inquiry, before forfeiture occurs.

Act of January 30th, 1844, Hartley's Digest, 652; our appendix, No. 6.
Browmer *v.* Hicks, 22 Texas, 161, 162.
Luter *v.* Mayfield, 26 Texas, 325.

14. Strict performance is not required under such contracts, as to building cabins, having powder, &c.; but only a "fair effort" to perform, or a "performance *cy pres.*"

U. S. *v.* Arredondo, 6 Peters, 745.
Fremont *v.* U. S., 17 Howard, 560.
U. S. *v.* Sibbald, 10 Peters, 323.
U. S. *v.* Hornsby, 10 Wallace, 240.
U. S. *v.* McMicken, 97 U. S., 215.

15. The action of Texas in passing the ordinance of 1845, and its various obstructing acts against the colony contractors, obviated the necessity of performance or a tender of performance on the part of Mercer.

Arlington Case, recently decided.
Hills *v.* Albany Exchange Bank, lately decided.
R. R. *v.* Land Commissioner, 36 Texas, 393.

16. All obstructive acts of Texas were in violation of the constitutions of the Republic of Texas, of the State of Texas, and of the United States, as being retrospective, as disturbing vested rights, and as impairing the obligations of contracts.

Gunn *v.* Barry, 15 Wallace, 610.
Green *v.* Biddle, 8 Wheaton, 2.
Davis *v.* Gray, 16 Wallace, 233.
Hamilton *v.* Flinn, 21 Texas, 716.
Sequestration Cases, 30 Texas, 689.
1 Paschal's Digest Texas Statutes, page 42.
Wirth *v.* Branson, 98 U. S., 119.

17. There were never any forfeiture laws passed in Texas under which grants like this could be forfeited.

Hancock *v.* McKinney, 7 Texas, 455, 456.
Swift *v.* Herrera, 9 Texas, 279.
Jones *v.* McMasters, 20 Howard, 11.
Airhart *v.* Massieu, 98 U. S., 498.
Sabriego *v.* White, 30 Texas, 589.

18. By the articles of annexation of 1845, by which Texas was made one of the United States, the State of Texas received all the vacant and unappropriated public lands of Texas in trust to be applied to the satisfaction of land liability of the republic under this contract.

Benton's Abridgment Debates of Congress, vol. 15, pp. 171, 196, 202.
1 Paschal's Digest Texas Stat., p. 44.
Texas General Statutes of 1879, art. 3795.
Debates of Texas Constitutional Convention of 1845.
Bank *v.* Guttslick, 14 Peters, 31.
Perry on Trusts, section 82.

19. The record or official report of Commissioner Crockett as to the number of familes who "emigrated" and "settled" as "*colonists* of Mercer Colony" up to October, 1848, was a "judgment," and proves the settlement of 1,256 families as "*colonists* of Mercer Colony."

Comm'r Crockett's Reports, Record, 116 to 142.
Hartley's Digest, p. 702; our appendix, act No. 15.
Thomerson *v.* State, 8 Texas, 172.
Stirman *v.* State, 21 Texas, 734.
Hatch *v.* Dunn, 11 Texas, 717.
Hancock *v.* McKinney, 7 Texas, 443.
Russell *v.* Randolph, 11 Texas, 466.
Byrne *v.* Fagan, 16 Texas, 395.

20. Mercer was not required by his contract to run boundaries, &c.; and the act of February 3d, 1845, requiring him to run exterior lines was void.

Ledyard *v.* Brown, 27 Texas, 403.
Green *v.* Biddle, 8 Wheaton, 2.
Hamilton *v.* Flinn, 21 Texas, 716.
County *v.* Morrison, 28 Minnesota, 261.

The obstructing ordinance of 1845 did not destroy Mercer's rights.

8 Opinions of Attorneys-General, 536.
Caudle *v.* Weldon, 32 Texas, 358.
Davis *v.* Gray, 16 Wallace, 232.

21. The so-called "judgment" rendered in the suit of "A. C. Horton, governor, *v.* Mercer, &c.," in Navarro county, in 1848, on "publication," is void, because there was neither service, seizure, nor appearance to give jurisdiction.

Brooklyn *v.* Insurance Co., 9 Otto, 362.
Mohr *v.* Manniere, 11 Otto, 422.
Pennoyer *v.* Neff, 5 Otto, 714.
Windsor *v.* McVeigh, 3 Otto, 274.
Cooper *v.* Reynolds, 8 Wallace, 309.
Harrington *v.* Williams, 31 Texas, 448.
Stoddard *v.* McMahon, 35 Texas, 295.
Settlemeier *v.* Sullivan, 7 Otto, 449.
McIlheney *v.* Secrest, Dallam's (Texas) Decisions, 538.
Hays *v.* Barrera, 26 Texas, 81.

22. This was the law in Texas in 1848.

McIlheney *v.* Secrest, Dallam's Decisions, 538.

23. There was no "affidavit" for publication as required by the Texas statute; which rendered that Navarro judgment void.

Hartley's Digest of Statutes, page 243.
Harrington *v.* Williams, 31 Texas, 457.
Doty *v.* Moore, 16 Texas, 592.

24. There was no law in Texas which authorized a proceeding by publication in that Navarro case against Mercer's associates as "unknown" defendants; and the proceeding against them was void.

Bartley *v.* Morgan, 13 Texas, 342; 1 Otto, 508.
Hollingsworth *v.* Barbour, 4 Peters, 466.
Town of Pana case, decided March 5th, 1883.

25. And that Navarro judgment, being joint, and being void as to Mercer's "unknown" associates, was void as to Mercer also.

Hulme *v.* James, 6 Texas, 242.
Freeman on Judgments, 136.

26. There is not shown to have been any "publication" in fact in the "Navarro record;" and for that reason the "judgment" therein was void.

Blossman *v.* Letchford, 17 Texas, 647.
Goodlove *v.* Gray, 7 Texas, 483.
Allen *v.* Weyser, 29 Texas, 153.
Lyon *v.* Paschal, 45 Texas, 436.
McCoy *v.* Crawford, 9 Texas, 353.

27. The recital in the Navarro record, that "service had been perfected" by "publication," does not state facts as to time, place, mode, or nature of publication, and is not from the one who the statute requires to make publication, and is therefore not adequate to support a judgment.

Blossom *v.* Letchford, 17 Texas, 647.
Goodlove *v.* Gray, 7 Texas, 483.
Settlemeier *v.* Sullivan, 7 Otto, 448.
Galpin *v.* Page, 18 Wallace, 366.

28. In such cases of constructive service, *even when* there is *a seizure*, it must appear from the record that all the statutory steps were taken, and nothing will be presumed in its favor.

Gilpin *v.* Page, 18 Wallace, 369.
Settlemeier *v.* Sullivan, 7 Otto, 449.
Herrington *v.* Williams, 31 Texas, 448.
McRee *v.* Brown, 45 Texas, 508.
Stoddart *v.* McMahon, 35 Texas, 295.

29. The Navarro suit being in the name of "A. C. Horton, acting Governor," for the benefit of the "people" of Texas, and not in the name of the *State*, was of no effect upon the rights of Mercer or the State.

1 Paschal's Digest Statutes, pages 70, 71, and sections 1431, 2892, 2863, 2870, 1355, 3663, 3666.
Matthews *v.* Offley, 3 Summer, 115.
De la Gaza *v.* Bexas, 31 Texas, 485.
Bainbridge *v.* Downs, 6 Mass., 253.
Irish *v.* Webster, 5 Greenleaf, 171.
Hunter *v.* Field, 20 Ohio, 340.
Lawton *v.* State, 5 Texas, 271.

30. The claim of complainant as against the State is not barred by limitation or lapse of time, because it is a case of an express trust.

Perry on Trusts, sec. 863.

31. And the complainant's rights against the State are not barred by time for the further reason that limitation does not begin to run until there is a right to sue the State.

Whitney *v.* State of Mississippi, 52 Miss., 732.
Angell on Limitations, 49, 54.
Wood on Limitations, 254.
Richards *v.* Maryland, 8 Cranch, 93.

32. And complainant's rights are not barred by lapse of time as against Walsh, for the reason that every new patent Walsh issues, or threatens to issue, is a new cause of action, arising then.

33. The rights of complainant under the articles of annexation of Texas to the United States are not barred, for the reasons above stated, and also for the additional reason that limitation never bars a claim which arises or a right which is given to individuals under a treaty or compact between nations.

King & Gracie's case, Decisions of Joint Commission of 1853 between England and United States, pages 305 to 310; to be found in Senate Documents of 1st and 2d sessions of 34th Congress, Document No. 103, vol. 15, page 305.

34. Under the laws of Texas the statute never bars in equity if there is a reasonable excuse given for the delay, and there is a reasonable excuse given in this case.

McKim *v.* Williams, 48 Texas, 92.
Bender *v.* Crawford, 33 Texas, 750.
Whitney *v.* State of Miss., 52 Miss., 732.

35. An injunction was proper to prevent respondent Walsh from clouding the titles to the lands in Mercer's Colony.

Davis *v.* Gray, 16 Wallace.
Board Liquidation *v.* McComb, 92 U. S., 531.

36. By the terms of the *contract* with Mercer it was the duty of defendant Walsh, as Land Commissioner, to issue to complainant the 1376 land certificates to which he is entitled, and another 1376 upon complainant paying $12 in money and $640 in Texas scrip, or its value in 1844.

Contract, Record, page 96.

37. And this is also his duty under the statutes of Texas.
1 Paschal's Digest Statutes, page 706, article 4241.
Gen. Statutes of Texas, (1879,) art. 3893.

38. This duty of the Land Commissioner is a ministerial duty, which can be enforced by mandamus.
1 Paschal's Digest Statutes, art. 1407.
Texas General Statutes, (1879,) art. 1198, clause 18.
U. S. *v.* Carl Schurz, 12 Otto, 379.
Land Comm'r *v.* Bell, Dallam's Decisions, 366.
Comm'r Land Office *v.* Smith, 5 Texas, 471.
R. R. *v.* Land Comm'r, 36 Texas, 384.
Davis *v.* Gray, 16 Wallace.

39. And it can, in a case like this, also be enforced by a *mandatory injunction*, prohibiting and enjoining the respondent Walsh from further withholding from complainant the land certificates to which he is entitled.
High on Injunctions, sec. 358.
Story's Equity Jurisprudence, sec. 959.
Kerkshaw *v.* Thompson, 4 Johns. Ch. R., 609.

40. The land certificates issued to complainant should be of such a kind as may be located not only in Mercer's Colony, but on any part of the lands of Texas which are vacant.
Articles of Annexation, 1 Pasch. Digest, 44.
Texas Gen. Stat. of 1879, art. 3893.

41. The contract with Mercer, taken together with the articles of annexation, give the right to locate complainant's land claims on any portion of the vacant lands of Texas.
1 Paschal's Digest Stats., 44.
U. S. *v.* Clark, 16 Peters, 232.
U. S. *v.* Sibbald, 10 Peters, 323.

Ex parte Sibbald, 12 Peters, 495.
U. S. *v.* Acosta, 1 Howard, 24.
U. S. *v.* Burlington R. R., 98 U. S., 340.
Heydenfelt *v.* Daney, 93 U. S., 638.
U. S. *v.* Watkins, 97 U. S., 223.

42. Under the Texas acts of August 12, 1870, and May 16, 1871, also, the land certificates to the complainant should be such as may be located on "any part of the public domain of the State."

2 Paschal's Digest Statutes, page 1443.
Appendix to our briefs, pages 25 and 26.

43. The proviso to those acts of 1870 and 1871, limiting claims under them to not beyond January 1, 1875, does not apply to this case, because it is a trust case to which statutes of limitation do not apply, and because the obstructions and refusals to issue certificates prevented the limitation from operating.

R. R. *v.* Comm'r, 36 Texas, 397.
Davis *v.* Gray, 16 Wallace.

44. Nor was any demand for certificates before January 1st, 1875, necessary under those acts, to save complainant's rights thereunder; for it was "reasonably certain" that the demand would be refused; and therefore no demand was necessary.

The Arlington Cases, recently decided.

45. But such a demand was made in 1873. (Record, 241.)

46. In issuing certificates to be located outside of the "Mercer's Colony" boundaries, the differences in value should be taken into account.

47. Relief, by compelling the Land Commissioner to perform his duty by issuing the land certificates to complain-

ant, can be given, without the State of Texas being a party to the record. The court will act on the *equitable* rights when the trustee of the legal title cannot be made a party.

Perry on Trusts, section 878.
Whalley *v.* Whalley, 1 Vernon, 487.
Heath *v.* Percival, 1 Peere Wms., 684.
Attorney-General *v.* Beliot College, 9 Modern, 409.
Bank U. S. *v.* Osborn, 9 Wheaton.
Davis *v.* Gray, 16 Wallace.

48. The proceeding against respondent Walsh is not against the State; and it is within the jurisdiction and power of the court to make him issue to the complainant the land certificates and patents to which complainant is entitled, and which it is his duty to issue.

Osborn *v.* Bank U. S., 9 Wheaton.
Davis *v.* Gray, 16 Wallace.
Board Liquidation *v.* McComb, 92 U. S.
Arlington Case, recently decided.
Louisiana *v.* Jumel, decided March 5, 1883.
Texas General Statutes of 1879, art. 3893.

49. The obstructing acts of April 19, 1879, and February 15, 1881, passed by Texas pending this litigation, will not be permitted to affect this pending case; but said acts will be construed as only prospective.

Waide on Retroactive Laws, secs. 50, 264, 266, 297.
Pembroke *v.* Epsom, 44 New Hamp., 114.
Beebee *v.* O'Brien, 10 Wisconsin, 481.
Louisiana *v.* N. O., 12 Otto, 203.
Curran *v.* Arkansas, 15 Howard, 304.
Constitution of Texas, 1 Paschal's Digest, p. 49, § 14.

Waide on Retroactive Laws Sec 113

50. "The Commissioner of the General Land Office is hereby authorized to issue to all persons and corporations such land certificates as they are entitled to under any gen-

eral or special law." This statutory duty should be enforced in this case.

Texas General Statutes (1879), Art. 3893.

51. The contract of Mercer with the Republic, and the contract between Mercer and his associates, created him trustee for his associates, and gave him power to appoint his successor, and gave similar power of appointment to his successor. This power was executed by Mercer, and afterwards by Hancock; and the associates have ratified it and accepted Preston as their trustee. His right to sue in his own right, and as trustee, is clear.

Record, pp. 97, 144.

Perry on Trusts, secs. 288 to 297.

Daniel's Chancery Practice, 875.

JOHN MASON BROWN,
GEORGE M. DAVIE,
Counsel for William Preston.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

WILLIAM C. WALSH,
Commissioner of the General Land Office of the State of Texas,
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No. 863.] *vs.*

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Appeals from Circuit Court of the United States for the Western District of Texas. In Equity.

Mr. Peeler's Reply to Briefs of Gen. Preston and Mr. John Mason Brown.

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The positions assumed and attempted to be maintained by Gen. Preston and Mr. Brown are: (1) that the Mercer contract is a *grant in presenti* of specific lands; (2) that the judgment of the Navarro District Court, adjudging said contract void, etc., is a nullity; and (3) that, in satisfaction of a trust created by the articles of annexation, the Commissioner of the Land Office should be compelled to issue certificates, to be located anywhere on the public domain of the State.

The Mercer Colony contract not a grant in presenti.

In his brief (p. 39) Gen. Preston says: "There was no condition in the grant precedent to the vesting of the title in Mercer." He also speaks of the record and delivery of the grant to Mercer (p. 9–39). There is no evidence, however, of any such *record* or *delivery*. The contract—and there was but one—was signed just as any other contract would have been; and instead of being delivered to Mercer, was left with the Secretary of State.

Mr. Brown, in his brief (p. 8), asserts that the contract "is in terms, as well as in legal effect, a grant of lands." He cites, in support of this view, *Melton* vs. *Cobb*, 21 Tex., 539. A review of this case will be found in our brief (p. 68 *et seq*). The question did not arise in the case, and it is not intimated that the Mercer contract was, either expressly or in legal effect, a grant of lands. The suit was an action of ejectment between private parties, neither the State or the contractors being represented, or in any manner bound by the judgment.

The claimant, whose title was sustained, held certificate issued by Crockett, under act of 1850. In the preceding volume (*Causici* vs. *La Coste*, 20 Tex., 269), the same Court, only the year before (1857), explained the true nature of such contracts. They say—

> "It was by virtue of acts to be performed by the parties that they were to be acquired and become invested with the properties of legal rights. At that time everything was in *expectancy*. The only right the parties then had was the right to perform their contract with the Government, and reap the benefits it was intended to confer."

And in another place, the acts to be performed by the contractors are spoken of as "precedent acts." This opinion will be found in our brief (p. 44 *et seq.*)

See also 16 Cal p 194

We notice some of the other cases cited:

Ruch vs. *Rock Island*, 97 U. S. 693, is as to breach of conditions subsequent when estate has been vested by dedication.

Les Bois vs. *Brammell*, 4 How., 449, involved the construction of the Louisiana treaty. Amongst other things referring to the power of Morales to grant the public domain it is held, that this power was in a great degree a political power, and by the treaty the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity, and that courts of justice could not without legislation execute the power, because the holder of an incomplete title had no standing in court. This is one of the cases cited in our brief, (p. 69,) on the subject of political trusts.

Stoddard vs. *Chambers*, 2 How., 285, involved the location of a New Madrid certificate, and holds that a patent issued for lands reserved from sale is void.

Smith vs. *United States*, 10 Pet., 326, involved construction of Louisiana treaty. Discussing the particular grant in question in that case, the court say, (p. 32.) "This then was the nature and effect of the grant to vest in the petitioner *a title in full property* to all the lands in either province containing saline mineral, or where there were mill seats which he might at any time locate in quantities to suit his own pleasure, or at any other place that might suit his interest." Notwithstanding the terms of the grant, the court held its rejection proper, because no survey had been made under it prior to the treaty of cession. On this point the court say, (p. 33): "At the time of the cession nothing had been so severed either by a public or private surveyor, or any act done by which the King *could be in any way considered a the trustee* for St. Vrain for any portion of the ten thousand arpents; and there was no spot in the wnole ceded territory in which he had or could

claim an existing right of property. An indispensable prerequisite to such right was some act by which his grant would acquire such locality as to attach to some spot. Until this was done the grant could by no possibility have been perfected into a complete title. It is clear therefore, that the integrity of the public domain had in no way been affected by this grant in March 1804."

New Orleans vs. *United States*, 10 Pet., 662, involved the construction of the treaty of cession, and the right of the City of New Orleans to a common thereunder. The court held that neither the fee to the common nor the right to regulate its use had vested in the Federal Government. They say (p. 737): "The State of Louisiana was admitted into the Union on the same footing as the original States. Her rights of sovereignty are the same, and by consequence no jurisdiction of the Federal Government, either for purposes of police or otherwise, can be exercised over this public ground which is not common to the United States. *It belongs to the local authority to enforce the trust*, and prevent what they shall deem a violation of it by the city authorities."

Washburn on Real Property, 3d Ed., (bottom p. 173 and top p. 174,) referred to by Mr. Brown states: "And when a grant was made by the State of Pennsylvania to and upon his paying a certain sum after a survey made, it was held that upon a return of such survey, and payment having been made, the title and legal possession of the land vested at once in the grantee," citing in support of text, *Potts* vs. *Gilbert*, 3 Wash., C. C., 47. In this case the plaintiff Potts produced a regular title from the Commonwealth of Pennsylvania, commencing with a warrant in 1784, payment of the purchase money on the same return of survey in the year 1788, and a patent in 1800. Mr. Justice Washington in his charge to the jury says (p. 478:) "According to the law as decided in this State the title of the Common-

wealth vests in the grantee upon the return and acceptance of his survey, and the payment of the purchase money, and consequently the legal possession must be vested in him at the same time." Verdict for the plaintiff. We see no reason to complain of this case, but fail to see its application to the question of grants upon conditions precedent, and subsequent.

Indeed, a careful examination of all the cases referred to by learned counsel to sustain their assertion that the Mercer contract is a grant, will not shake the positions taken or weaken the force of the authorities cited in our brief. (p. 55.) We there show from the decisions of this court, and the courts in Texas the difference between grants *in presenti*, and mere contracts, such as Mercers under which no title at the time passed or could be acquired except upon performing the conditions of the contract and making proof thereof.

The Judgment of the Navarro District Court.—Mr. Brown, in his brief (p. 32–41), makes a labored effort to break down this judgment. His objections are, in the main, of an exceedingly technical character, even if the judgment was being directly reviewed by an appellate tribunal. He complains that it was not authenticated according to Rev. Stats. U. S., Sec. 905. This was not necessary in a Federal Court, sitting within the State in which the judgment was rendered. (*Turnbull* vs. *Payson*, 95 U. S., 418; *Mewster* vs. *Spalding*, 6 McLean 24, Deady 299.) He complains that it is void because of the absence of a statement of facts, citing Pasch. Dig., Art. 1488; Hartley's Dig., Art. 782; *McFadden* vs. *Lockhart*, 7 Tex., 573; *Chrisman* vs. *Miller*, 15 Tex., 160; *Davis* vs. *Davis*, 24 Tex., 187, and other cases.

In the last-mentioned case it was held that where service on the defendant had been by publication, and the proceedings *ex parte*, if there were no statement of facts upon which

the final decree was rendered incorporated into the decree itself, or preserved as a part of the record, the judgment would be reversed. It is not intimated in this, or in any other Texas case, that the judgment would, on this account, be held *void*, or open to collateral attack. Nor is it held in any Texas case that the statement of facts must be incorporated in the judgment.

In answer to the 11th interrogatory (Rec., 306, 307), Crosby, the District Attorney, by whom the case was conducted, says he is satisfied a statement of facts was made up and preserved, because it was deemed prudent to preserve the facts to guard against the contingency of the death of some of the witnesses. The copy of the judgment does not purport to contain a statement of facts. The Court House was destroyed by fire, and the record in evidence is a copy of only a part of the proceedings. [See, on this subject, our brief, p. 61, *et seq.*]

He complains that the suit was in the name of A. C. Horton, Acting Governor of the State, &c., and not in the name of the State of Texas, and asks, upon collateral attack, that the judgment be adjudged null on this ground.

Neither the ordinance of 1845 (App. 100) nor the act of May 11, 1846 (App. 101) directing the Attorney General to bring the suit, required it to be brought in the name of the State. They merely required him to institute suits against Colony Contractors, who had entered into contracts "with the President of Texas," &c., and regarding, no doubt, the Governor of the State as the successor of the President of the Republic, the suit was brought in his name for and in behalf of the people of the State.

The case of *State* vs. *Williams*, 8 Tex., 384, was a case in which the court held the suit pending at the time of annexation, for the recovery of duties, might be thereafter prosecuted in the name of the State.

The case of *De La Garza* vs. *Bexar County*, 31 Tex.,

484, was a motion under the execution law of the State made by the Chief Justice in behalf of the county. The court held that the proceeding should have been in the name of the county, quoting, on page 485, the statute on the subject, as follows:

> "All suits brought by or against any of the counties of this State shall be brought in the name of or against the County of [naming the county], and by that name they may sue and be sued," &c.

Nor was the question raised by collateral attack, as is sought here.

Hunter vs. *Fields*, 20 Ohio, 340, was not a case of collateral attack. The court, quoting from *Irish* vs. *Webster*, 5 Greene, 171, say, (p. 343): "Public policy seems to require that an agent of the State thould make his contracts *not in his own name* but in the name of the State, and that all the securities he may receive should be made payable to the State, and that when they have been made payable to him as agent the suit should be in the name of the State." In case at bar the contract was made by Houston "acting for and on behalf of the Republic." (Rec. 91,) and the suit was brought by his successor for and in behalf of the State. This is a very different question from that presented on writ of error in the Ohio case.

In *Benton* vs. *Woolsey*, 12 Pet., 27, Benton, as district attorney, filed an information in his own name in behalf of the United States, for the purpose of foreclosing a mortgage to the United States, and the proceeding was sustained, the Court considering the United States as the real party.

In *Commonwealth of Kentucky* vs. *Dennison, Governor, etc.*, 24 How. 66, it was held, in an original proceeding in this court, that a suit by or against the Governor of a State as such in his official character is a suit by or against the State. Suits by Governor etc

24 Tex 503
27 " 33
25 " 687
21 " 753

If the Navarro judgment had been in *favor of Mercer and associates*, and the State had argued that the State was not bound, on the ground that the State was not a party, would the Court have listened with patience to such an argument?

He assails the judgment as a nullity, upon the ground that neither the person or subject matter was brought within the jurisdiction, citing *Pennoyer* vs. *Neff*, 95 U. S., 714, and *Steagall* vs. *Huff*, 54 Tex., 196. The first mentioned case as noticed in our brief (p. 667,) was decided several years after the adoption of the fourteenth amendment and the Navarro judgment is not to be tested by the inhibition therein contained, as to due process of law, etc. The case in 54th Texas did not involve any law applicable to this case. The court held that a judgment by default in a justice's court, based on citation, by publication that residence of defendant is unknown, the law not authorizing service in such cases might be attacked collaterally, the fact appearing upon the record. The court say, (p. 196): "In this case the record of the justice court *affirmatively* shows that the judgment by default against Huff was rendered upon citation by publication issued upon a ground *not authorized* by statute, and was consequently void and not voidable only."

He complains that the petition does not contain an allegation that Mercer and associates were not inhabitants of the State, etc. Under the law in force at the time, which we have quoted in our brief (p. 65,) and to which he refers as sec. 676, Hartley's Dig., this was not necessary. The fact might appear *in the course of the suit*, etc.

He insists that the judgment is void, because the process act in force at the time did not authorize the service of citation by publication on unknown or non-resident defendants not being the heirs, successors, or legal representatives of a

deceased party; citing *Bailey* vs. *Morgan*, 13 Tex., 342, and *McKee* vs. *Brown*, 45 Tex., 507.

Neither of these cases refer to the law (Hartley, Art. 676), in force at that time. But if, upon collateral attack, the judgment can be held void as to the "associates," its validity as against Mercer, who owned the greater part of the stock, and in whose shoes the complainant must stand as to title, etc., remains unquestioned.

He also insists that the judgment is void for want of service of process, and that the recital therein, and it "appearing to the Court that service had been perfected, and two terms of the Court having elapsed since publication," etc., is worthless; citing 45 Tex., 436–507; 29 Tex., 150; 28 Tex., 597; 27 Tex., 431; 17 Tex., 647; 9 Tex., 353; 7 Tex., 483,

The case of *Lyon* vs. *Paschal*, 45 Tex., 435, was not decided under the law in force when the suit in Navarro County was brought, the judgment did not recite there was service, and the case was on review by writ of error.

In *McKee* vs. *Brown*, 45 Tex., 503, the Court held in review on writ of eror that a citation, by publication against "McRee," would not support a judgment against "McKee."

Allen vs. *Wyser*, 29 Tex., 151, was judgment by default against non-resident, who had been cited by publication. In reviewing case on writ of error the Court say (p. 153:) "The return of the sheriff is not in conformity to law. *It does not appear from the record* that the defendant has been duly served with process. The judgment must, therefore, be reversed and remanded for further proceedings."

In *Gamble* vs. *Dalrymple*, 28 Tex., 593, the Court held that a judgment, based upon an unwarranted mode of service (in this case it was substituted service on an attorney), could not be sustained, and would be reversed on error.

Hill vs. *Faison*, 18 Tex., 428, discusses the insufficiency

of the publication of a citation issuing from a justice's Court. The question of collateral attack was not raised.

In *McCoy* vs. *Crawford*, 7 Texas, 353, the return of the Sheriff was, "Served by reading the within, Aug. 2d, 1839." The court say:

> "The mode of obtaining *personal service* of process upon the defendant in 1839, when the citation in the suit against Grigsby purports to have been served, was by delivering to him a copy of the writ and petition. (p. 356.) But the decision was not rested on this ground alone. It is said (p. 357), moreover, the administrator, Crawford purchased with the funds of the estate, and if the *judgment against Grigsby had been valid and the sale legal*, still the purchase would have enured to the benefit of the estate."

Goodlove vs. *Gray*, 7 Tex., 483, was judgment by default, reviewed on writ of error. The law considered (Hartley, Arts. 811–2894) was not the law under which service was made in case at bar. The only evidence of service was the affidavit of the publisher. The court say:

> "It is the mere *ex parte* affidavit of a stranger to the record. It is not adopted or referred to by the officer in making his return, which is required to be signed by him officially."

Thus, it will be perceived, not one of those Texas cases, so much relied upon to defeat the judgment of the Navarro District Court, are authority for holding, on collateral attack, said judgment to be void.

In addition to the authorities referred to in our brief (p. 666), we ask the attention of the court to a well-considered decision by the Supreme Court of Kentucky (*Newcomb's Executors* vs. *Newcomb*, 13 Bush., 544), decided in 1877, with which his Honor, Mr. Justice HARLAN, must be familiar, as he was of counsel in the case. It is there held that the absence of the affidavit for a warning order from the record does not render the judgment void; that the pre-

sumption is that the warning order was entered by the Code; that when the record shows the service of a summons, actual or constructive, as a general rule, it imports absolute verity, or when the judgment shows the parties appeared, or that due notice had been given, the judgment is conclusive until reversed or vacated by some direct proceeding; that the judgment of a court of general jurisdiction cannot be assailed in a collateral proceeding, and adjudged void, for the reason that the evidence of some of the preliminary steps to be taken in the inception of the action is not found among the files of the clerk in whose office they were required to be kept; and that whether the judgment was rendered against a resident or non-resident, it is a domestic judgment, and the same presumptions must be indulged as to jurisdiction.

In *Hall* vs. *Law*, 102 U. S., 461, it is said (p. 463):

> "The validity of this partition is assailed, because no complaint or petition of the applicant for the partition appears in the record, as the foundation of the proceedings, and without one it is contended they are void. The statute does not, in terms, require the application of the proprietor seeking partition to be presented in writing; or, if one be presented, to be filed among the records of the court. All that it designates as necessary to authorize the court to act is, that there should be an application for the partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper, for at least four weeks. When application is made, the court must consider whether it is by a proper party; whether it is sufficient in form and substance; *and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication upon these matters.* The *recitals in the order* show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises on the presentation of the application, accompanied with proper proof of previous notice of it. *The order of the court appointing the commissioners is a determination that*

the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned on appeal or writ of error by a superior tribunal, invested with appellate jurisdiction to review it."

He complains that the judgment is void, because, as he says, it rests not upon the charge of fraud or non-performance, but upon the ground of intrinsic illegality and unconstitutionality of colonial contract and that this was effectually disposed of by the cases of *Melton* vs. *Colb*, 21 Tex., and *Bryan* vs. *Shirley*, 53 Tex. The petition specifically charges non-performance of the conditions of the contract with respect to the settlement of emigrant families. (Rec., 322.) It alleges a failure to survey and make the boundaries of the territory, as required by the terms of the contract and the law. (Rec., 323.) It concludes: "Your petitioner further charges and avers that the said Charles Fenton Mercer, and associates, have violated all and singular the contracts and covenants contained in the contract of colonization, before referred to *and made a part hereof*." (Rec., 323–324.) The ordinance of 1845 directing the bringing of the suit, provides, "And if, upon such investigation, it shall be found that any such contract was unconstitutional, illegal, or fraudulent, or that the conditions of the same have not been complied with according to its terms, such contract shall be adjudged and decreed *null and void*." (App., 100.) The judgment following the ordnance does adjudge and decree the contract "null and void," upon the verdict of the jury empanneled in the case, which reads: "We, the jury, find the facts and allegations in the petition to be true. It is proven that numerous witnesses were examined on the trial, and gave answers touching all the allegations in the petition. The evidence was regarded as conclusive before the case was submitted to the jury. (See our brief, p. 64.)

Even if it be true that *Melton* vs. *Cobb*, 21 Tex., declared the Mercer contract to have been valid, etc., we do not see how this is to operate as a *reversal* of the judgment of the District Court of Navarro county. Neither the State, the governor, nor any other officer of the State were parties to this suit. We have already sufficiently shown that it can have no force in the determination of the questions presented on this appeal. (See our brief, p. 68, *et seq.* where this case is reviewed.)

Bryan vs. *Shirley*, 53 Tex. does not touch the questions under consideration. The main point in this case was as to void and voidable patents, the court holding that a patent for land issued to one not a colonist of Peters colony, which embraced land within the reservation, would not be held void at the suit of parties having no equities prior to the issuance of patents. The court refers to *Melton* vs. *Cobb* as authority for the validity of the reservation. Whether Mercer performed his contract or his contract was forfeited by the judgment of the Navarro District Court was not a question in the case, and there is not even an allusion thereto.

He assails the ordinance of 1845, and says it was not communicated to Congress as a part of the Constitution. Gen. Preston in his brief, (p. 31,) not only says the same thing, but charges "it was withheld for fear that it would cause the resolution for annexation to be rejected." We have no evidence as to its transmission or non-transmission to Congress with the Constitution. Nor is it material. And notwithstanding Mr. Brown says on page 5 of his brief that the Texas courts have held this ordinance to be futile and inoperative, the contrary is true.

Stewart vs. *Crosby*, 15 Tex., 546.

The insinuation that the brave and distinguished men who controlled the affairs of Texas at that time resorted to the trick of withholding a paper for fear it would defeat annexation results, as we may charitably suppose, from the

prejudiced condition of mind incident to being both lawyer and client in the same case.

In one breath learned counsel praise the ordinance because it did not annul colonial contracts and left questions of their validity to the courts, and in another they abuse it because it did leave them to the courts. Mercer says the ordinance helped him to settle the colony, (Rec., 174.) He knew of its adoption, and yet we don't hear of any objections from him to the admission of Texas.

Lastly, it is claimed, with respect to this judgment, that it is void because there has never been any statute authorizing or regulating forfeitures, citing *Airhart* vs. *Massieu*, 98 U. S. 491.

With this case Mr. Justice WOODS is familiar, the writ of error being prosecuted to reverse the judgment rendered in the court over which he presided at the trial. The main question was as to the right of alien heirs to recover lands titled to their ancestor before the revolution and independence of Texas in 1836. No judgment of forfeiture was set up, and the court, referring to Sec. 4 of Art. 13 of the Constitution of 1845, says: "Under this provision it has been held since its adoption no locations can be made upon lands held by aliens on the ground of their title being void, since no law has been framed to furnish the means for declaring forfeiture for alienage," citing *Hancock* vs. *McKinney*, 7 Tex., 384; *Swift* vs. *Herrera*, 9 Id., 263; *Johnson* vs. *Smith*, 21 Id., 722; *Suter* vs. *Mayfield*, 26 Id., 325.

In *Hancock* vs. *McKinney*, p. 456, Mr. Justice Wheeler, referring to the same section of the Constitution, remarks "As the legislature has as yet made no provision on this subject, and until some provision shall be made, it is evident that under the Constitution no such proceeding can be instituted."

In *Swift* vs. *Herrera*, the court, referring to the same provision of the Constitution, (p. 280,) say, "The courts have

not been authorized to permit *at the instance of individuals* inquiries into the causes of forfeiture of grants and to annul or recall the titles or proof that the forfeiture has been incurred, and there was no error in striking out such portions of the pleadings as would have let in proof to establish facts of this character." *Hancock* vs. *McKinney* is then referred to with approval.

In *Johnson* vs. *Smith*, neither the Constitutional provision just mentioned, or the point under consideration are noticed.

In *Suter* vs. *Mayfield* the doctrine is affirmed that an individual cannot enter on lands previously granted and assert a title thereto on the ground of forfeiture. None of these cases resemble the case at bar, where a judgment has been obtained in a suit the institution of which is expressly directed by law.

If, in the case at bar, the Navarro District Court was competent to deal with the subject-matter and the parties, every presumption is to be indulged in support of the proceedings.

Cornett vs *Williams*, 20 Wall., 226;
McNitt vs. *Turner*, 16 Wall., 352.

The issuance of certificates to be located anywhere on the public domain.—Upon reading the briefs of Gen. Preston and Mr. Brown the Court will be struck with the entire absence of anything like a serious attempt to sustain their claim to lands within the colony. What influence the solemn, and, as we must suppose, honest declaration of Geo. Hancock for himself and associates made to the legislature of Texas to the effect that he had abandoned his claim to lands within the limits of the colony may have had in this matter we can only conjecture, but it is very evident that it is now their chief object, under their cross-appeal, to induce this court to decide that the Commissioner

of the Land Office of Texas may be compelled to issue certificates to be located anywhere on the public domain outside of the colony. They discuss no other character of relief. They do not so much as offer a suggestion to aid this Court in solving the difficulties in the way of affirming a decree vague and uncertain in its character, and which operates with great harshness on rights and interest not represented before the court. After asking for a decree, which for months, [it would have been years if this Court had not advanced the case,] has greatly obstructed the administration of the land department of Texas, and worked serious injury to a large number of persons who were not parties and had no opportunity of protecting themselves, they leave the decree to take care of itself. What they now want is disclosed in the following extracts taken from pages 44 and 45 of Mr. Brown's brief:

> "It is asked that by mandatory injunction the Commissioner of the General Land Office of the State of Texas and all his successors in office, and all his and their assistants and subordinates be compelled to issue to the complainants certificates for 1,376 sections of 640 acres of land each to be located upon any vacant lands of the public domain of Texas.
>
> And in like manner certificates for 1,256 sections of 640 acres of land each, to be in like manner located, on the payment first made of $12 in cash for each such section, and the surrender of $640 in audited liabilities of the republic of Texas or the equivalent in value of the same as of 29th January, 1849, for each such section, such being the pre-emptive right under the contract, and its most valuable feature."

He goes further and asks "that these certificates be declared to be secured by the *existing trust* covering all the public domain of Texas and entitled to priority of issue and location, and open and free to be located upon any of the public lands *at the selection of complainant.*"

Nothing of this sort was dreamed of when the original bill was filed. It is only, as we must infer, after they became satisfied that on account of the non-performance of the contract, laches, stale demand, acquiescence, and the difficulty of getting the necessary parties before the Court, they must fail as to lands within the colony that the idea of compelling the issuance of certificates or closing the land office of Texas occured to them. We have already adverted somewhat to this most extraordinary demand—a demand which the court below very properly refused. (See our brief, p. 109 and App., 131.)

Upon what principle is this Court to sanction the granting of such relief? If answered, for the purpose of enforcing a trust, it becomes important to give this alleged trust a local habitation and a name.

Is it a trust arising from the alleged grant or contract, and which exists and cannot be enforced independent of the contract, or is it a trust created and declared by the artices of annexation? If the former, so far as the *trust aspect of the case* is concerned, it is limited in its operation to the subject-matter of the trust—the land within the colony.

Mr. Brown, on p. 11 of his brief, after quoting Perry's definition of an express trust, says:

> "The contract of Mercer exactly responds to every feature of this definition. The property is pointed out by *metes and bounds*, the *persons* are identified, and the purposes are distinctly stated."

If the Mercer contract is, as claimed, a grant *in presenti* of specific lands by metes and bounds, which the State of Texas, by virtue of the terms of the contract, holds in trust for Mercer, how can the trust be floated so as to cover the entire public domain of the State?

Has it ever been asserted if the United States, by legislative grant, or contract puts itself in the attitude of trustee

with respect to a tract of land in Arizona, described by "metes aad bounds," that any court can declare a trust as existing on the whole public domain in all other States and Territories?

The truth is, in so far as this alleged trust depends upon the contract, or, if you please, *grant*, it cannot be divorced therefrom. The grant, or contract, is the *substance*—the thing by which the rights of the parties must be measured—the trust is but the *incident and shadow*—take away the substance and the shadow is gone. It is to avoid this result that the Articles of Annexation are relied upon as creating a trust on public lands outside of the Colony. If the Mercer contract were a grant of specific lands by "metes and bounds," and the title, as contended, vested in Mercer, the granted lands were not vacant. In the Articles of Annexation, the subject-matter of the trust is "*the vacant and unappropriated lands.*" And how a grant in presenti of specific lands by "metes and bounds" can be held a *debt* or *liability*, as against the grantor, and be shifted to and satisfied out of other lands, is something we do not understand. (See discussion of 3d error assigned in our brief, p. 56, *et seq.*)

Mr. Brown says on page 20 of his brief: "The identical land to which complainant would be entitled would thus, indeed, be lost to him, but he would be *recompensed* in other lands taken from another part of the same public domain." He cites as sanctioning such substitution:—*Haydenfeldt* vs. *Daney Gold Co.*, 93, U. S., 638, and *United States* vs. *Watkins*, 97, U. S. 223.

The first mentioned case places a liberal construction upon an act of Congress, granting lands to Nevada "until," say the Court, "the status of lands was *fixed by a survey*, and they were capble of identification, Congress reserved absolute power over them, and if in exercising it the whole, or any part of a 16th or 36th section had been disposed of the State was to

be compensated by other lands equal in quantity, and as near as may be in quality," (p. 640.) Such action of the political departments, under authority of law, presents a very different question from that presented here, where a *Court* is asked to allow a suitor to help himself out of any lands he pleases, belonging to one not even a party to the cause.

In *United States* vs. *Watkins* the Court say (p. 223:)

> "As to the point made by the Government that the lands in question were not *sold* by the United States to third parties, but were *donated* to settlers thereon, and that, therefore, the case does not come within the words of the act of 1860, *granting to successful claimants* other public lands in lieu of those claimed, we do not think that this objection is tenable. If the Government has disposed of the lands in any manner, we think the *fair interpretation of the act* is that the claimant should have other lands in lieu thereof. As we have so held in several other cases, we do not deem it necessary to discuss the subject further."

The State can only be *liable* to convey to Mercer the particular tracts of land to which he has become entitled by reason of the performance of his contract. When he performed his contract as to any *particular section or half section*, the State might be said to hold the *legal title* thereto, in trust for him.

How the articles of annexation shift this liability and trust, and attach them to *other lands with which the performance of his contract had no connection*, we cannot perceive. Courts of equity, as we have already noticed, (see our brief, p. 109,) when specific performance is impracticable and the *contracting parties are before the court*, sometimes decree a *money compensation*, but we have yet to see a case where they have undertaken to discharge the obligation in other property, whether of lands or anything else, and selected by *one of the parties, the other not being represented.*

Learned counsel seem to think that the public domain of Texas has been turned over to the defendant, Walsh, with full authority to settle all supposed obligations against the State by giving land certificates.

Walsh is not one of the contracting parties. As an *individual* he has no interest whatever in the matters in controversy in this suit. He is being proceeded against *officially*. The court will not compell him to do anything which it is not his *official duty* to do. This official duty must be founded upon some *law of the State*. It must arise in one of two ways—Either by the legislature directing the commissioner to issue certain certificates to Mercer and associates—in which case the particular legislative act would be his authority, and the thing which the court would enforce, or by the legislature having cast upon the commissioner the duty of performing in behalf of the State, the Mercer contract. In the first case he acts under express law, by which alone his duties are to be regulated—in the second he acts under authority of law, but his duties are measured by the contract. Now there is no general or special law making it the duty of the commissioner to issue certificates to Mercer or any other colonial contractor. He can only issue certificates by authority of *general or special law*, (see statute quoted in our brief, p. 109.) On the contrary, there is a law prohibiting the issuance of certificates in cases like this. (See statute quoted in our brief, p. 95,) and the certificates even if issued, unless countersigned by the Governor of the State, (who is not a party to this suit,) could not be surveyed by any surveyor, public or private, and recognized as a valid land certificate for any purpose whatever, (*id.*) The acts of August 12, 1870, and May 16, 1871, of which extracts appear on pages 25 and 26 of Gen. Preston's brief, have no application whatever.

They give authority to "*the holder of any genuine land certificate*," etc., to locate the same, etc. Mercer and asso-

ciates are not *holders* of certificates within the meaning of these acts. Besides, the court, for the law of the State, prescribing and regulating the official duties of the commissioner, must look to the Revised Statutes of the State, which took effect September 1, 1879, and to laws subsequently passed.

As to the contract, no law of the State has devolved upon Walsh the official duty of carrying out the Mercer contract. There is nothing he can do or refuse to do connected with the performance of the contract. The question is one of settlement for what *has been done*, and the State has not authorized Walsh to make the settlement, and if it had, the settlement, according to the contract, would be made not by the issuance of certificates, but by deeds to *certain specific parcels of land within the limits of the colony.* (See on this point our brief, p. 96.)

Learned counsel say that compulsory relief, such as they ask, is authorized by the laws of Texas. Exactly the reverse is the case under the constitution, statutes and decisions of the State. (See our brief, pp. 86 and 87.)

The case of *United States* vs. *Schurz* (102, U. S. 378) so confidently asserted as affording a precedent for the compulsory relief sought in the case at bar, is not, as we understand it, in point. It is there held that the Supreme Court of the District of Columbia is authorized to issue the writ of mandamus as an original mandamus in cases where, by the principles of the common law, the petitioner is entitled to it, and that when the officers of the United States, whose action is rendered by the laws necessary to vest the title in the claimant have *decided in his favor, and the patent to him has been duly signed, sealed, countersigned and recorded,* the title of the land passes to him, and the ministerial duty of delivering the instrument can be enforced by mandamus. An examination of the opinion will show that if the Supreme Court of the District had possessed no other powers

than those belonging to a Circuit Court of the United States, and had not been aided by special legislative authority it could not have issued the writ. In the course of the opinion it is said: "This Court has, with a strong hand, upheld the doctrine that so long as the *legal title* in these lands remained in the United States, and the proceedings for acquiring it were, as yet *in fieri*, the Courts would *not interfere* to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere (p. 396.) The State of Texas unquestionably holds the *legal title* to her public domain, and if she has taken a single step to patent a foot of it to Mercer it has not been pointed out.

The extent of the relief demanded is quite as extraordinary as the demand itself. For the 1256 persons named in Crockett's report they ask for certificates for 1376 sections of 640 acres each, and in addition thereto to be located in like manner on the public domain for 1256 sections of 640 acres each on payment of $12 in cash, and surrender of $640 in, and the liabilities of, the Republic, for each of said last mentioned sections. They assume, in the first place, that Crockett issued 1256 certificates, *each for 640 acres*. If they had examined Crockett's report they would have seen that of the 1256 certificates issued by him, that 479 were for half sections of 320 acres, and one for a fraction of 39 acres. They not only ask for an excess of about 230,400 acres over and above what Crockett issued certificates for, but propose to take all without regard to the portion the settlers would be entitled to.

According to their theory the State has settled with the people in the colony, and must now again settle with them, making double payment. (See our brief, p. 53, 54.)

The demand for 1256 sections to be purchased, etc., we cannot believe would have been made if attention had been given to the contract. A reserved or alternate section could only be purchased by *settling a family thereon*. This

is made perfectly plain in two places in the contract. (Rec., 95–100; see, also, our brief, pp. 11, 51, 52, 53, 54.)

Mercer, in his report of December 31, 1845, speaking of a desired modification of the contract, says: "Such settlements, according to other provisions of the contract, which limit the operation of the contractors to the alternate sections only, unless they acquire by purchase, they cannot afford, from their present means, the right to *settle those sections reserved* to the republic, will embrace a tract of fifteen miles square at least." (Rec., 178) And in his prospectus headed "Texas Colonization," it is expressly stated "each alternate section is reserved to the republic, but may be purchased for a stipulated price at any time *within the five years allowed for completing the contract.*" (Rec., 208.)

The request, thirty-five years after the contract expired, without a particle of evidence to show a family was ever settled upon a reserved section, or to show that any offer of purchase, with or without tender of price, was ever made, that the court now compel the State of Texas to sell its public domain on such terms, however reasonable in the opinion of learned counsel, will, we apprehend, remain but a request. Besides, there is nothing in the pleadings and proofs in the court below to sustain any such relief.

When a Court of Equity grants relief, it is such relief as is consistent with the general law of the land, and authorized by the principles and practices of Courts of Equity; "and even the failure of the mode of procedure, as established by law, or the hardship of the case is not sufficient to justify a Court of Equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles."

Heine vs. *Tax Commissioners*, 19 Wall., p. 658.

And we may well apply the language of the court in *United States* vs. *Macon*, 99 U. S., p. 591: "We have no

power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation to this case, with respect to compelling the commissioner to issue certificates not only not authorized, but prohibited by law."

Map as evidence.—Referring on p. 14 of his brief to the lithographed copy of map which Mercer had made in New Orleans in 1845, General Preston says this "was duly accepted and recorded." There is no evidence that the map was "accepted" or "recorded." The defendant Walsh, speaking not of *copies* of maps which witnesses Craik and others had seen, but of the *particular map in the office of the Secretary of State* does say: "The said pretended map has all the appearances of being of recent manufacture, and the paper or material on which the same is made looks fresh and new, and presents no indication whatever of age, and this defendant believes and charges that the said pretended map was manufactured just before the filing of the plaintiffs' original bill, and without the knowledge of the Secretary of State, deposited in the office of the said Secretary of State, there being no file or other mark upon said paper to indicate the time when said paper was deposited in said office." If complainant had regarded this statement in the sworn answer as material he could easily have shown by other witnesses the appearance of the map whether fresh, and the date of filing if it had file marks. He could have examined the Secretary of State in whose possession the map was, or if he had requested it the map would have been produced in court for inspection. No reference is made in our first brief to the charge as to the appearance of this map, etc., and it is only because Preston has seen proper, for some reason, to give it special prominence in his brief that we notice it now. Even if Walsh's charge, based upon his

belief after an inspection of the map is incorrect, it is not the only instance disclosed by the record of unsupported charges. For instance, Preston in his sworn bill charges the late distinguished Chief Magistrate of Texas and the Commissioner of the Land Office with conspiring to procure the passage of laws to embarrass complainant in assertion of his rights, etc. (Rec., 49.) Judge Pardee says, in his opinion that this charge is without foundation, (App., 128,) and Preston did not even attempt to fortify his statement by proof. But the map is not evidence for any purpose. Neither the law or contract required it to be returned to the office of Secretary of State. The Land Office is the proper place for maps, etc., and to have any force as evidence they must come from it. If evidence, of what is it evidence? Is it evidence of the situation of the exterior lines of the colony? The proof does not show that these were run. (See our brief, p. 47–48.) Is it evidence that the colony was subdivided into sections? Nothing of the kind appears on the map. Surely it is not evidence of the introduction and settlement of families or the building of cabins, and yet learned counsel seem to think it material if not conclusive on all these points.

It was not annexed to or called for by the contract, and not being found in the Land Office where it belonged, it was not admissible for any purpose. *Welder* vs. *Carroll*, 29 Tex., 317.

In *Johnson* vs. *Jones*, 1 Black., 209, it is held that maps, surveys and plats are not necessarily, and of themselves, independent evidence, and are therefore to be received only so far as they are shown to be correct by other testimony in the cause.

See also *Missouri* vs. *Kentucky*, 11 Wall., 395.

Mercer's Reports as Evidence.—Learned counsel lay great stress on the effect of Mercer's reports as evidence.

On page 13 of his brief Gen. Preston says: "Mercer made many reports to the proper officers, which were duly received, accepted without objection and recorded as perpetual memorials of his performance of the contract." If there is any evidence in the record to sustain this sweeping assertion we have failed to discover it. The contract provides the nature and mode of proof of performance. (Rec., 96, see also our brief, page 50, *et seq.*) There is nothing in the law requiring reports to be made, and the only provision in the contract on the subject, made it the duty of Mercer and associates, until they should obtain an act of incorporation, to "transmit a list of their co-partners and a statement of the share or shares of each in the stock or property of the company," etc. (Rec., 97, see also our brief, p. 75.) If evidence of anything these reports could be used for the purpose only of showing shares of stock, etc., for this is all the contract required them to contain.

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It would stretch the rules of evidence very far to make these exparte narrations and discussions "perpetual memorials" of the performance of the contract. And as to their receipt and acceptance without objection, etc., we are not aware that the Republic or State was called upon, even if the Secretary of State had notified the proper officers of the receipt of those communications, to make objection, especially as they were not, and were not intended to be, the proof of performance required by the contract. Nor is there any evidence, except as to one of them, when these communications were received at the office of the Secretary of State.

The first report made by Mercer, July 11, 1844, is in conformity with the contract, and shows that he understood the extent of this requirement. He says:

> "I am instructed by the 'Texas Association,' under the provisions of the contract, etc., to transmit to the Secretary of State, or other proper officer of the Government of Texas, a list of the co-partners chosen in

> pursuance of the above contract, and a statement of the share or shares of each in the stock or property of the association or company formed by them, and also of the common name or title assumed by them," etc. (Rec., 89.)

He made five reports, which appear in the record, and all of them except the one of February 1, 1847, which is confined to a statement of the share-holders, were made in the years 1844–5, and they cover but a small portion of the time the contract had to run.

So far, then, as these "perpetual memorials" are concerned, they can amount to nothing more than *ex parte* statements of the shares of stock held by the several members in the copartnership.

Referring to report of September 25, 1845, he says (p. 14) that this report shows "that he (Mercer) had made nine hundred surveys subsequent to the date of the Colony grant and before the date of his report, September 25, 1845." And on same page, in another place he says: "This report shows that Mercer had made surveys for more than nine hundred families in the colony before September 25, 1845," etc. It was not Mercer, *but persons who claimed adversely to him*, who made these surveys, and Mercer so expressly states (Rec., 83. See our first brief, p. 46.)

These highly colored reports of Mercer as to what he was doing and expected to do, are contradicted in many respects. For instance, he says, in his report of January 17, 1845, there were 109 emigrant families on the grant July 1, 1844 (Rec., 168), when, according to the paper signed by Rowlett et al., *only 22* had been introduced at that time (Rec., 102). In his report of September 25, 1845, he says he settled, the preceding year, 220 families (Rec., 83), when, according to the paper signed by Rowlett et al., *only 57* had been introduced. It may be inferred that Rowlett et al. made their families as full as possible, for the larger the number the greater the compensation in land; and if there

had been the large number represented by Mercer, they would have found them. The difference between 57 and 229 families in a new and sparsely-settled country is too great to be overlooked.

On p. 49 of his brief Gen. Preston attributes his inability to make proofs of later date than February 1, 1847, by these reports to the loss of Mercer's private papers, as testified to by witness Garnett, as to the burning of the State Capitol. Garnett merely says that his *correspondence* with Mercer was destroyed during the late war. (Rec., 184.) He does not pretend that any of these reports which ought to have been sent to the Secretary of State were destroyed, and with respect to the burning of the Capitol the *Entire Archives* in the office of the Secretary of State were preserved. Preston could have had access to them at any time

Surely Mr. Brown, when he says in his brief (p. 28), "The contract expired by limitation on 29th January, 1849, as the latter reports of Mercer as to the number and name of colonists *have not been* furnished by the defendant from the records of his office," does not mean to assert that such reports were made and were in defendant's possession. The reports were not to be made to the defendant, as Commissioner of the Land Office, but to the Secretary of State, and there is not a particle of evidence that any report was made later than February 1, 1847. Mercer, by this time, being no doubt advised of the institution of the suit in Navarro county, he knew of the ordinance directing the suit to be brought as early as December 31, 1845, for he discusses and encloses a copy of it in his report of that date. (Rec., 171.) And it is not to be supposed his friend Sam Houston, and the delegate in the convention of 1845, who espoused his cause or his lawers in Texas, did not inform him of the suit. He evidently made up his mind that he could not successfully defend it, hence let it go by default. The character of this

last report is itself significant. Mercer does not, as in former reports, indulge in *couleur de rose* accounts, of what he has done or expects to do. He confines himself simply to what the contract requires—a statement of the shares of stock, etc. (Rec., 87–88.)

An Act of February 2, 1850,—Crockett's Report.—Take away this act, and the report of Crockett, made thereunder and the case of complainant is gone. It is from this report that the 1,256 families is obtained. They assert and re-assert in various ways that the act and the report are *conclusive* upon the subject of the performance by Mercer of his contract to the extent of the introduction and settlement of the persons named therein—that the proofs made before Crockett, as Commissioner, establish as an introduced and settled emigrant, the *identity* of each one of the 1,256, to whom he issued certificates. We have already in our brief (p. 40 to 47, inclusive), refuted this assertion, showing by careful analysis the differences between the proof required by the contract and the act in question. Looking to the whole law, and not to detached sentences and words, it is plain that the Legislature had in view the relief of persons who had settled on the colonial reservation. In the act of 1841, under which the contract was made, it was expressly provided (sec. 12.) "That a *failure on the part of the contractors*, and a forfeiture of this contract shall not be prejudicial to the rights of such families and single persons, as they may introduce, who shall be entitled to their respective quotas of land agreeable to the provisions of the law." (See act quoted in our brief, p. 3.) Effect was given to this provision in the contract (Rec. 99.) Under the ordinance of 1845 actual settlers, under the contract, were not to be affected by any decree which the Court might render against the contractors—they might still receive, "not to exceed six hundred and forty acres to the head of a family,

and three hundred and twenty acres to a single man." (App. 100.) While in the same ordinance it was provided: "That the Legislature is hereby restrained from extending any contract for settling a colony, and from relieving any contractor from the *failure of the conditions, or forfeiture accruing from non-compliance with the* contract." (App. 101.) See also opinion in *Causici* vs. *La Coste*, 20 Tex., 269, quoted in our brief, p. 44–45.)

From January 29, 1844, to the passage of the act in 1850, no one in the colony, whether introduced by Mercer or not, had been able, on account of the reservation, to get a patent to his lands. Naturally, they were clamorous for relief. Even if Mercer had emigrants there he had failed for six years to make proofs of surveys, etc., so as to obtain deeds and put himself in a position to convey to the emigrant the portion he was entitled to. If the emigrant wanted a title it was useless to look to Mercer, for he could not make it, and it is a most singular thing in this case, that Mercer, or those claiming under him, if entitled thereto, never applied to the State for deeds. Relief, then, could only be granted by the State, and the State being unable to relieve Mercer from a *failure* to perform his contract, gave the settlers the quantity of land authorized by the ordinance of 1845. It matters not that the act of 1850 speaks of the settlers as colonists, and provides that no change shall be made in the boundaries of the surveys of settlers, with or without the consent of the contractors, etc. The purpose of the law, *so far as the contractors are concerned*, is too plain to be mistaken, even if it did not expressly provide—

> "That nothing herein contained shall be construed so as to place the contractors of said colony in a *better condition* in regard to the State of Texas than they would be if this law had not been passed." (App., 102.)

We quite agree with Gen. Preston in his contention that it was not the purpose of the law to affect the Colony con-

tract, and with his statement on p. 50 of his brief, that "the Legislature ordered the questions to remain in *statu quo* between the State and the Colony contractors." And Gen. Preston, when he states, on p. 51 of his brief, that the date, October 25, 1848, was fixed in the law to correspond with the date of the judgment of the Navarro District Court annulling the contract, he gives a good reason why the Legislature—the political department, having no power to review or reverse the decrees of the courts—let the questions between the State and the contractors remain in *statu quo*. In a supplemental act of January 24, 1852, this judgment is expressly mentioned. (App., 106, 107.) So far, then, as the purpose of this act is concerned, it did not intend, on the one hand, to declare a forfeiture, or, on the other, to admit that Mercer had performed his contract as to dispense with proof of performance. Nor was it a waiver of performance, for the time of performance had long since passed It simply left him, as learned counsel say, in "*statu quo*."

If, then, the act does not *admit performance*, and the object of the act was to relieve the settlers, or even *colonists*, if you please, does the proof made before Crockett, as Commissioner, show performance, and is this proof admissible against the State?

It is not for several reasons. First, because the proof required is different in many and material respects from that required by the contract as already pointed out in our brief. (p. 42.) For instance, under the contract Mercer could get nothing for a single man unless he was 17 years old when introduced into the colony, while under the law if he was 17 on the 25th day of October, 1848, without regard to his age when introduced he could get a certificate. Young, who was only 14 years old when he settled in the colony, got a certificate from Crockett and sold it. (Rec., 278–279.) How many more of the 1,256 did the same thing the record does not disclose. Under section 13 of the act of February 4,

1841, quoted in our brief, (p. 3), and which is a part of the contract, it is expressly provided that "all substitution of families living within the Republic, by the contractors, shall not entitle them to any premium for such families or operate in favor of them for the number of families which they are bound to introduce."

The act of 1850 is silent upon the subject.

In the second place the proof under the act is *res inter alios acta*. It is not evidence against the State or against Mercer. If this were a suit against the State would Mercer be estopped from claiming persons as colonists merely because Crockett rejected their claim? In this state of the case we would no doubt hear from learned counsel a very different argument as to the legal effect of this report.

Paper signed by Pillans et al., as evidence.—Gen. Preston, referring to the paper signed by Pillans *et al.*, (Rec., 106,) says, on page 12 of his brief: "This evidence was accepted without objection, and recorded in the land office as proof of the performance by Mercer of his contract." There is no proof of the *record* of this paper in the Land Office; nor was it intended to be or accepted by any one as proof of performance. [See on this point our brief, p. 36, *et seq.*] He says further that this paper "had been of record among the archives of Texas more than twenty years before this suit was brought." This paper, like many others offered in evidence by complainant, fails to show date of filing. How, *when*, or through whom it found its way into the land office does not appear.

Further, of this paper, he says: "Daniel Rowlett, B. J. Pillans, and Thomas C. Bean, were duly sworn, and deposed that the list contained a true and accurate account and statement of emigrant families specially introduced and settled by Charles Fenton Mercer and his associates, then known as the Texas Association, prior to May 1, 1845," etc. Their affidavit, (Rec., 105,) states that it contains "a true and ac-

curate statement of emigrant families *as certified to by the heads thereof*," etc. The insufficiency of this paper as proof under law and contract is shown in our brief, page 36.

Political reminiscences—Debates in Convention of 1845.—Had we the time, and inclination to do so, it would serve no useful purpose, so far as the determination of this case is concerned, to follow Gen. Preston in the political reminiscences and sketches with which his brief abounds. Besides the labor of ascertaining whether his memory in these matters is sustained by authentic history would be greatly increased by his failure to give the sources of his information. For instance, on page 6, after speaking of the Peter's contract, of the feelings of Gen. Jackson toward the republic of Texas, of the *peddling* of land scrip by the republic to support her officers, and other matters, he concludes by saying: "The history of the times and the public documents all establish these facts." It is in just such generalities he deals until he comes to the debates of the convention of 1845. In appendix to our first brief we have given the court the entire debates as taken from the journal. Preston gives very partial selections from certain speakers. Whilst not really material, we may be excused for taking some notice of the matter.

> The Congress of the Republic had only the year before taken from the President the power to make colonial contracts. They had gone further, and declared forfeited all such contracts, the conditions of which had not been, or should not thereafter be, *strictly and rigidly* complied with. So far, then, as the policy inaugurating these contracts was concerned, that had been speedily abandoned. None favored or defended it. How to get rid of what was conceived to be its pernicious results, consistent with public interests and private rights, was the question which confronted the Convention. The discussion upon the subject was able and elaborate, and those participating in the debate stood in the very front rank of patriots, statesmen,

jurists, and soldiers of Texas. It was General Rusk, the President of the Convention and the first Senator from Texas to take his seat in the Congress of the United States, who offered the substitute for the 21st section of the general provisions, the substance and spirit of which were afterwards embodied in the ordinance of August 27, 1845. Section 21 of the general provisions, as reported by the committee on that portion of the Constitution, preserved in general terms rights of property and of action acquired under the Constitution and laws of the Republic, etc. (Ap., 27.) The substitute offered by General Rusk, and upon which the debate was chiefly had, was as follows:

"Whereas, it is believed that the colonization contracts heretofore entered into by the President of Texas, as well as the laws authorizing said contracts, assigning large tracts of country to certain individuals, for the purpose of colonization, were unconstitutional, and calculated in their operations, to deprive the citizens of Texas of their just rights, and that the terms annexed to them have not been complied with by the contractors.

"The Legislature is prohibited from extending any further time to the contractors, or dispensing with any conditions attached to them; and they shall, at their first session, pass such laws as may be necessary to institute judicial investigations, for the purpose of enquiring into and annulling said contracts: *Provided*, They are proven to be illegal and void: *Further provided*, The actual settlers already in said colonies shall be guaranteed in their just rights to their quantum of land as settlers."

Some, believing these contracts not only unconstitutional, but fraudulent in their inception, wanted to annul them out and out. Others, equally as strong in their convictions as the void and fraudulent character of these contracts, thought the question of their annullment and forfeiture a judicial one, and not only urged its remission to the courts on this account, but, in some instances, because of the fear that if they were abrogated influences might be brought to bear to prevent the Congress of the United States from accepting the Constitution and thus defeating annexation. None,

however, seemed to want to destroy the rights of actual settlers. Among those who favored a submission of the question to the courts was General Rusk, though in the course of his remarks he uses these words: "That they (the colony contracts) *are unconstitutional I firmly believe. That they were obtained by fraud or are fraudulent in their nature I firmly believe.*")App., 73.)

Judge Lipscomb, who had been Chief Justice of the Supreme Court of Alabama, before coming to Texas, and who, for many years, sat upon the supreme bench of the State of Texas, was chairman of the committee reporting the ordinance of August 27, which was afterwards adopted. (App., 94.) Notwithstanding his desire to submit the question of forfeiture to the courts, it will be found that at one time during the progress of the discussion he proposed as a compromise a resolution "that all contracts with the government of the Republic of Texas for settling colonies be and the same are *hereby annulled* from and after the passage of this ordinance by the people." (App., 91.)

Judge Evans, afterwards a member of Congress and one of the judges of the Supreme Court of the State, favored the abrogation of the contracts, giving the contractor whatever premium lands he had acquired, and the settler his home. Amongst other things he said:

"To place these contracts in the most favorable light, they must be considered not as private or ordinary grants, but as grants of public policy, made for political ends; and, consequently, repealable at pleasure by the law-making power of Texas. The lands specified in these contracts is not vested in the contractors, only so much as they may be entitled to as premiums for the actual introduction of emigrants, of which we propose not to divest them. The purpose for which the contracts were made was to insure a rapid and dense settlement of our frontier districts of country. Had this policy been founded in wisdom, 'tis now no longer needed; it is superseded by the change now taking place in our relations with the United States.

"But I assert that the object for which they were granted has been totally defeated by the manner in which the contractors have been carrying them out. Instead of sectionizing the country, building cabins, and

bringing families and settling them on the alternate sections, they have held back, importuning Congress for extension of time, waiting for the country to fill up with emigrants, with the fraudulent intention of deriving princely fortunes from their contracts without fulfilling any of the obligations on their part.

"In the meantime, as emigration flowed into the country, from the pitiful quantity of land offered by the contractors, and seeing the country unprepared for their reception, the emigrant would leave the colony, and go where he could settle himself free from any restraints, and procure as much land as he wanted."

App., 78, 79.

J. Pinckney Henderson, afterwards Governor of the State, though opposing any attempt to annul these contracts, voted for the ordinance.

App., 99.

The views of Judge E. B. Baylor, who had been a member of Congress from Alabama before coming to Texas, and who for many years was a district judge of the State of Texas, may be gathered from his concluding remarks. He says:

"In any view I can take of the matter it seems to me that these contracts ought not to continue in existence. I should be perfectly willing to consider them as having been complied with up to the present moment. I am willing to give the contractors the premium lands to which they are entitled up to this time, and something more. The resolutions of the Congress of the United States give us the entire jurisdiction and control over our domain. They calculate that it will pay our public debt, and say that we may dispose of it as we think proper.

"In conclusion, I wish it distinctly understood that I do not wish to do anything which might be considered unjust or illiberal so far as the contractors are concerned; but I never can consent, as a humble representative of the people, to suffer cancers like these to remain upon the body politic; for one, I have the nerve to apply the caustic and the knife, and hazard all the consequences. (App., 62.)

Mr. Wright had this to say of the Mercer contract

"Let us examine for a moment the circumstance

under which this contract was entered into with Charles Fenton Mercer. We find him here at the Eighth Congress, supplicating for the contract; and see the privilege allowed to Gen. Mercer. He was permitted to appear before Congress and advocate the principles set forth in his contract. And what did Congress do? They rejected all of his demands with disdain. As nearly as I can recollect, the vote stood 33 to 6. He then sought the President, to see if he could not meet with better success in that quarter; and the Congress seeing what he was up to, introduced a law repealing all laws upon that subject, which passed both the House of Representatives and the Senate, and was sent to the President on or about the twenty-second day of January, 1844, for his approval, and about the twenty-seventh of the same month he sent it back to the House with his veto. Upon the twenty-eighth the House passed it over the veto by a vote of 34 to 5, and sent the bill and veto to the Senate upon the twenty-ninth And upon that same day, to the astonishment of all his friends, he signed, sealed, and delivered this instrument called a contract into the hands of Charles Fenton Mercer, and that, too, with a perfect knowledge of all the facts, well knowing at the same time what would be the action of the Senate upon the law under consideration. And upon the thirtieth day of the same month the Senate did pass the law over the veto of 8 to 3. Thus this contract was made under very suspicious circumstances to say the least. This is enough to kill it of itself; the presumption of fraud is too strong for it ever to be tolerated by the people here. Then, I say, it is the duty of this Convention to arrest this foul attempt to impose upon the people of Texas; to declare this contract a nullity in itself, as it always was, and open this country, thus attempted to be wrapped up in mystery and fraud, for the honest payment of the debts of Texas. This one is an exception; there is no right in it; it deserves the execration of this body. (App., 38–39.)

Mr. Mayfield, a distinguished lawyer of the Republic and State, took the floor several times, and urged with great earnestness the propriety of annulling these contracts. He said:

"I hold that this question is one exclusively of policy; or rather that policy, independent of other considerations, does direct that we should act upon this question without fear. When we come to look at the true facts of the case we find that some twenty-four millions of the public domain of Texas are occupied by the location and survey of certificates pronounced fraudulent by the tribunals of the country established by law. And when we come to estimate the area of the land to be squandered away among these various contracts, we find that it amounts to about as much more. Now, sir, the question presents itself to the consideration of the people of Texas, whether, upon this occasion, we should not adopt some act whereby these lands might be reclaimed to the country to support her credit and maintain her institutions, whether the people of Texas, by their delegates in Convention assembled, will wrest them from the greedy hands of these speculators, and appropriate means thus afforded to the honest payment of the national debt, contributing something to the support of common schools and the purposes of education in the land. The true issue is not one between Sam Houston and anybody else; it is one of justice and right between the country and a set of harpies who have preyed upon it from the time of the organization of our government down to the present period." (App., 72.)

Among those who favored an abrogation of these contracts was Judge Jewett, for many years a district judge of the State. He entered somewnat into a history of the legislation upon the subject (App., 29), and read an extract from a report of the Commissioner of the Land Office, for 1843, pointing out some of the evils of the system. (App., 30.) Amongst other things Judge Jewett said:

"I am in favor of suspending these contracts, because they are all forfeited. None of the contractors have introduced the stipulated number of families, nor have any of them afforded protection to the frontier—the inducement presented to Congress for making the law. At that time the frontier was infested with Indians, was threatened with Mexico, and the prospect of annexation was gloomy. It was thought

that, by authorizing these contracts, adequate protection would be afforded to the frontier. But this expectation was not realized.

"Another reason which I have is, that it would be a mere act of justice to the soldier, and all those who encountered the perils of our revolution. The first and most sacred pledge on the part of the government was that which gave the lands to the soldiers after the revolution of 1836. The Republic had then no money to give, and she did promise to give them all that was in her power, to wit, lands. I would vote, therefore, to suspend these contracts, because they interfere with this first and most sacred pledge.

"I will also vote to suspend them, because by so doing we shall increase the residue of the public domain left for the payment of our public debt. This is another cogent reason for me to pursue this course.

"I am aware that it will be argued by the opponents of this measure that the Senate or Congress of the United States may urge this section as an objection to the acceptance of our Constitution; that they may regard it as interfering with vested rights. But I cannot see what right the United States can have to interfere in this matter. The joint resolutions leave to Texas the exclusive control of her public domain. If we retain the public lands, we retain the right of exercising sovereignty over them; and the United States has no right to interfere with or dictate our action. It is a matter which pertains exclusively and solely to Texas; it is a matter relative to her domestic concerns. And if, with an honest view of liquidating her public debt, she suspends these contracts, and throws open these lands to location, she is but doing an act of justice, which will remain a bright and not a dark spot on our national escutcheon." (App., 33.)

General Davis, a prominent public man of that day, wanted all the contracts suspended in their operation, but was willing to give the contractor the benefit of his contract up to suspension, and the settler the benefit of his settlement. (App., 34.) He seemed to know something of the circumstances of the Mercer contract. He said:

"I do not pretend to know the character of all these

contracts; but I know something of one of them; and I da not believe it will be doing any injustice to the individuals concerned to make a brief statement of the facts. It will be recollected that any one of these contracts, which embraced the finest and largest tract of land upon the Trinity river, was made by Charles Fenton Mercer. How was it obtained, sir? I cast no censure upon any individual with whom it was made; I think, in all probability, an imposition was practiced upon him by Mr. Mercer, for I know that he did practice fraud at the time he obtained the contract. He appeared at Washington at the time of the session of Congress, and said that his business there was to get an extension of time for Peter's contract. What were the reasons he urged? He said that in the treaty between this Government and the Comanche Indians, the Republic had stipulated that no settlement should be made in a certain portion of the country which he represented to be included within that contract. He said that justice required that the time should be extended, at least so long as settlements were prevented in consequence of the treaty. At that the same session of Congress a law was passed repealing the law authorizing these contracts, and prohibiting any further extension of time being given in any of the contracts. During the time of its passage, and between the time at which the bill was sent to the executive for his sanction, and at the time at which it was returned with his veto, a new contract was made with Mr. Mercer. And what was the character of that contract? Was it an extension of time to Peters? No, sir. It was a contract granting him the whole broadside of a country. *Did he not know it was in opposition to the will of the people of Texas, so expressed by Congress at the time?* He obtained the contract under these circumstances, professing that he was only seeking an act of justice in the extension of Peters' contract. That was not all. With this contract in his pocket, and without communicating the fact to any member of Congress, he requested to be heard upon that subject, and the reasons which he advanced were those I have mentioned. *At the very time he was urging these claims he was practicing this fraud, for I pronounce it a gross fraud upon*

Congress. He had at this very time a contract in his pocket by which the fairest portion almost of the upper Trinity was granted to him. I will ask, sir, if this man could have believed anything else but that the people of Texas at the first opportunity would annul that contract. He must have known it." (App., 35.)

Judge Love, who for many years presided on the district bench of the State, preferred to have the matter determined judicially, but was willing to vote to declare these contracts null and void. After adverting to the circumstances under which the Mercer contract was made, he took occasion to say, in answer to the argument that Mercer's influence might have something to do with annexation if his contract was annulled: "Now suppose this matter to be investigated before the Congress of the United States, and that the contract of Charles Fenton Mercer is spread before them. Does he come there recommended to their sense of justice? No, sir; *but as one who has himself perpetrated a fraud upon the body politic of Texas.*" (App., 99.)

Miscellaneous Points.—On page 53 of his brief, Gen. Preston says: "Mercer was only compelled to settle five hundred families in five years to render his title indefeasible." Under the law he was required to settle 1,250, and under the contract 700. (See our first brief, p. 34–35.)

Mercer admits in a prospectus signed by him, that the contract "obliges him to settle on the granted lands 700 families in five years." (Rec. 208.)

His charge on page 34, that the defendant's answer, "incorporates the speech of Mr. Kauffman, in the convention, as to the hearsay rumors of the fraud of President Houston, set up by the appellant" is not correct. And the language used on page 47, viz: "Mr. Harris, the attorney-general is living, but his testimony, no doubt, for good reasons, was not taken. Mr. Crosby, who was district-attorney in 1848, having led a wandering life," may perhaps be excused, on the ground of strong personal feeling and interest in the result

of the suit. These are matters outside the record. If Mr. Harris was living, complainant could have taken his depositions, and if, as intimated, he knew something to the prejudice of the defendant, he would very certainly have done so. He knew by the interrogatories to Crosby and Riggs, that the judgment of the Navarro court would be relied upon. The depositions of these witnesses were on file more than a year before the hearing. Mr. Crosby is one of the most distinguished citizens of Texas, for many years connected with one of the most important railroad enterprises in the State as vice-president of the company, and as a lawyer and gentleman bears an untarnished reputation.

On page 56 of his brief, Gen. Preston, referring to certain allegations made in the original and amended bill, says: "These allegations are not denied by the appellant (Walsh), and are therefore admitted of record." This is the announcement of a new rule in the law of equity pleading and evidence. Preston's whole argument seems indeed to be based upon the idea that the entire *onus* rested on the defendant to disprove the allegations of the bill. In other words, complainant was to rest, and the defendant was to take the laboring oar and show that he had no case.

Referring to the duty of Walsh as commissioner, &c., to make discovery, Gen. Preston says (p. 61):

> "Moreover, it is easy for an officer, honestly inclined, with the clerical force at his command, to make such discovery; but it would be costly ruinous, and perhaps impossible, for the appellee or the Texas association to make such proof. Theodore Garnett, the nephew and sole devisee of Mercer, deposes that all of Mercer's papers were lost by him during the war (see Garnett's deposition, page 169 of the record). The refusal of the Land Commissioner to render such a discovery, after the court declared that a trust is established, is unusual and contrary to equity, and a further violation of the honest duties incident to the trust."

This language is certainly remarkable. In the firs place, Garnett does not say that all, *or any part*, of Mercer's papers were lost; he simply says, as already noted, that his "*correspondence* with Mercer was destroyed during the war" (Rec., 184). In the second place, if the defendant failed to make full discovery, his answer could have been excepted to, or defendant examined as a witness—neither of which was done. In the third place, defendant never, at any time, refused to furnish, when applied for, copies of papers in his office; and allowed, without demanding or receiving a fee, complainant's witnesses to examine all records and maps relating to Mercer Colony (Rec., 269. See our first brief, p. 52 and 107 *et seq*).

In *Barnes* vs. *Schneider*, 9 Wall., 248, where it was sought to compel the production of papers belonging to the archives of the office of Secretary of the Treasury of the United States, the Court say (p. 251): "The Government is not bound to furnish either the originals or certified copies to suitors, with whom it is contending, unless upon demand at the proper office, and tender of the lawful fees."

Case to be decided on its merits as it now stands.—General Preston seems very anxious to confine the Court in its consideration of this case to the position it occupied when the demurer to the original bill was passed upon. It would, no doubt, be better for him if the case had stood at final hearing, as it did upon demurrer to original bill, the demurrer *admitting* the facts, such as full performance, etc., alleged in said bill to be true; and if the defendant had been denied the privilege of filing an answer, and no proofs had been offered.

It was however nearly three years after the opinion on the demurrer before final hearing, during which time defendant filed a plea and two answers, and complainant a ong amended bill, and much testimony was taken by both

parties. It was the duty of the court below to decide this case both on the law and facts as it stood at final hearing, and not as it stood some three years before on an application for an interlocutory order. This court, however urgent the invitation to adopt a different view, will, we take it in reviewing the final decree from which we have appealed, look to *the case as it stood upon the pleadings and proofs when this final decree was rendered.* Decrees are made on rights as they stand at the time. *Randall* vs. *Brown*, 2 How., 406.

Notwithstanding General Preston states that he is willing to rest the law of this case upon the opinion of Mr. Justice Woods, and adopts this as a part of his brief, we have felt no embarrassment in discussing this case as it *is* and not as it *was*. We know that the learned justice referred to, and for whose opinions we entertain the highest respect in common with the other members of the bench, do not want counsel, merely because one of their number may have taken part in the decision of a case in the court below, to feel that a barrier has been raised against that frank and free discussion, which is the very life of an intelligent and impartial administration of justice. Such an argument, with respect to a decision on the circuit and on a preliminary question, in an early stage of a case, can have little weight with a court which has not hesitated in cases involving interests and questions of great importance, when satisfied of the incorrectness of its conclusions to reverse its own solemn and unanimous judgments.

Respectfully submitted,

A. J. PEELER,

Counsel for Walsh, Commissioner, &c.

109-297

Supreme Court of the United States.

MARCH, 1883.

WILLIAM PRESTON, ... Appellant,

VERSUS

WILLIAM C. WALSH, Commissioner of the General Land Office of the State of Texas, . . Appellee.

No. 864.

Errors Assigned by Appellant.

The circuit court declined to give relief to the extent prayed by complainant:

1. It refused to grant a mandatory injunction inhibiting the Land Commissioner's further refusal to issue certificates and patents for the ascertained quantity of land (1,376 sections), under the contract, within the colonial boundaries, or its equivalent in value elsewhere.

2. It refused a similar mandatory injunction inhibiting his refusal to issue certificates and patents on tender of the contract price, for the alternate 1,376 sections within the colonial boundaries, or its equivalent in value elsewhere.

3. It refused to grant a mandatory injunction, the effect of which would be to permit the location of complainant's patents and certificates on any vacant and unoccupied lands of Texas, within or without the limits of Mercer Colony.

4. It refused to recognize complainant's claim as a trust fastened upon the entire public domain and enforceable in equity as against the unappropriated lands.

WILLIAM PRESTON,
JOHN MASON BROWN,
Counsel.